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FELA IN RELATION TO AMTRAK

HEARING

BEFORE THE

SUBCOMMITTEE ON SURFACE TRANSPORTATION

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

THE FEDERAL EMPLOYERS' LIABILITY ACT (FELA) IN RELATION TO AMTRAK

JUNE 22, 1988

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FELA IN RELATION TO AMTRAK

WEDNESDAY, JUNE 22, 1988

U.S. SENATE,
SUBCOMMITTEE ON SURFACE TRANSPORTATION,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:05 p.m., in room SR-253, Russell Senate Office Building, the Hon. J. James Exon (chairman of the subcommittee) presiding.

Staff members assigned to this hearing: Sheryl Weber Washington, professional staff member; Robert Holleyman, staff counsel; and Gerri Hall, minority professional staff member.

OPENING STATEMENT BY SENATOR EXON

Senator EXON. The subcommittee will please come to order. Today, the Subcommittee on Surface Transportation meets to hear testimony regarding Amtrak's proposal to exempt its employees from the Federal Employers' Liability Act for a three-year test period.

In its 1987 and 1988 legislative report to the Congress, Amtrak requested that during a three-year test period jurisdiction over its employees' injury claims would be transferred to the various states workers' compensation laws.

During the recent Commerce Committee markup on the Amtrak reauthorization bill, Senator Kasten expressed an interest in Amtrak's three-year test case proposal. I agreed at that time to hold a hearing in order to listen to the views of Amtrak, rail labor, and other interested parties on Amtrak's specific proposal.

Amtrak has made its proposal to the Congress as a cost-saving measure. Amtrak received nearly $600 million per year in subsidy from the Federal tax dollars.

As a Member of the Senate Budget Committee, I am well aware that we must consider many ways that will help control Federal spending and reduce the budget deficit, even those ways which are controversial.

Particular proposals may or may not be adopted. But our runaway Federal red ink requires that we at least take a look at all of the ideas and proposals made regardless of their eventual merit.

Enacted in 1908 and significantly amended in 1939, FELA establishes a system of fault-based liability by which railroads may be held liable for their employees on-the-job injuries, including occupational disease and illness.

In comparison, state workers' compensation systems operate on a no-fault basis. Under state systems, no determination of negligence

is made, and the cause of the accident or illness does not affect the compensation additionally.

Each state establishes a fixed schedule of benefits based on the specific injury and the duration of that disability. It is my understanding that it has been a considerable length of time since a hearing has been held on this issue of FELA.

For that reason, as well as others, I am pleased that we will hear a variety of views today as we consider Amtrak's proposal.

Our expert witnesses include Senator Metzenbaum of Ohio, Chairman of the Labor Subcommittee, which has jurisdiction in this area, Neil Curtin, representing the GAO, John Riley, Administrator of the FRA, Graham Claytor, President and Chairman of the Board of Amtrak, and William Dempsey, President of the Association of American Railroads, Geoffrey Zeh, the President of the Brotherhood of Maintenance of Way Employees, Vice Chairman of RLEA and Co-chairman of the Coalition for Safe and Responsible Railroads, and Fred Hardin, International President of the United Transportation Union.

I will now turn to the ranking minority Member of the subcommittee, Senator Kasten, with my thanks to him for making the suggestion during the earlier markup that I referred to, and I am pleased that you brought this matter up, Senator Kasten, so that we can have this informational type hearing today. Senator Kasten.

OPENING STATEMENT BY SENATOR KASTEN

Senator KASTEN. Mr. Chairman, thank you. I first of all want to thank you for in fact scheduling this hearing today on this proposal to undertake a three-year study which would transfer the jurisdiction over Amtrak employee claims for on-the-job injuries over to the various state workers' compensation systems.

I think first of all it is important to recognize that the subject of this hearing is very limited in scope. The proposal before us has been included in Amtrak's legislative program for several years. It is, as I said, for a three-year study relative to Amtrak employees only.

During these three years, Amtrak employees would be covered for workplace injuries under the same workers' comp programs that cover almost all other workplace injuries in the country. In other words, this would treat Amtrak employees the same way that employees of airlines, trucking or bus operations of the other modes of transportation are treated.

Also I think it is important to point out that this three-year study would take place and at the end of that time, unless the Congress agreed by a vote to continue this arrangement to have the employees covered by workmen's comp, the employees would go back under the FELA system. FELA would remain in effect obviously for the rest of the railroad industry during this time because this legislation is specific to Amtrak. We would not have jurisdiction except with regard to the relation to Amtrak.

However, the study would allow the facts concerning the advisability of the change and the operation of the system to be devel-

oped for evaluation by our subcommittee, by the GAO, and possibly by other interested parties.

So what we are trying to do is to present an opportunity. I think it is an opportunity that Congress rarely has. We can study a proposed policy change in a microcosm and proceed from there.

Through this study, the Amtrak employees obviously are not left uncovered, but are covered just exactly the same way that all the other employees in industry would be covered. And I think we would find that there is no reason to continue this industry-specific, 80-year-old, fault-based system of workmen's comp. I think that we would find that we would be willing and anxious, then, for the Congress to make changes.

The importance of this hearing, and the importance of a study such as the one proposed, becomes all the more apparent when viewed in light of the arguments of several of its opponents.

There has been a strong assertion by the Illinois Public Action Council and by the Wisconsin Action Coalition that proponents of this study are against all rail safety. Well, they are simply wrong. They are completely wrong.

Mr. Chairman, you and I have worked together, we have led the rail safety efforts in terms of the bill that we have passed. In fact, I am hopeful that we are going to see that bill signed today.

But the mischaracterization of FELA as a general rail safety law, and the safety statistics quoted by some opponents, obscure the debate on what is the workmen's compensation system for rail employees. That is the key.

Also, Mr. Chairman, I was copied on a letter addressed to you yesterday from Mr. Capon, the Executive Director of the National Association of Railroad Passengers, wherein he speaks to misrepresentations of Citizen Action and the Illinois Public Action Council on the safety issues. And he states, and I quote, "We know of no convincing link between FELA and rail safety."

I ask that a copy of that letter, Mr. Chairman, be made part of the record.

Senator EXON. Without objection, so ordered.

Senator KASTEN. Because the FELA system is a fault-based, litigation-oriented system, I am also concerned about the effect that this system has on what should be the goals of a workmen's compensation system.

It seems that instead of a system for definite compensation for workplace injuries and subsequent rehabilitation, what we have instead is a system of finger-pointing as to fault, a lottery as to recovery, and delay.

According to the National Safety Council's Executive Vice President, Charles Hurley, and I quote, "Labor management cooperation is an essential foundation for good maintenance and safety procedures in all forms of transportation."

I think in the process of working through this FELA system, we will see that what we are doing instead is establishing an adversarial kind of a relationship between management and labor which actually leads to the opposite kinds of results.

So I look forward to the testimony that we receive here today and to the responses to the questions posed by the subcommittee.

Once more, Mr. Chairman, I thank you for going ahead with this hearing.

Senator EXON. Thank you very much, Senator.

I have an opening statement that Senator Hollings would like to have included in the record.

[The statement follows:]

OPENING STATEMENT BY THE CHAIRMAN

The Surface Transportation Subcommittee meets today to consider a pilot project exempting Amtrak from the Federal Employers' Liability Act. I think we must examine this proposal very carefully and make sure that we do not shortchange Amtrak workers in the name of an experiment. Perhaps we should look at the relationship of FELA to the industry as a whole, instead of proceeding on a case by case manner.

The Federal Employers' Liability Act has worked effectively for 80 years to protect workers from employers' negligence and compensate them for their pain and suffering. Many aspects of railroad employment are still dangerous, and our rail workers deserve fair and comprehensive coverage. We must ask ourselves whether it is appropriate to take this compensation system away from injured workers.

We also should not single out Amtrak workers for a pilot program which strips them of the FELA benefits enjoyed by the rest of the railroad workers in this country.

Before we enact any changes in our compensation system we must find an effective substitute. If FELA coverage were to end today, our rail workers might find themselves in a no-man's land with no insurance, until individual States decide to cover railroad employees under their workmen's compensation laws.

For these, as well as jurisdictional concerns I have regarding Commerce Committee action on FELA, I again stress the importance of carefully reviewing this issue prior to any further consideration of this proposal.

Senator EXON. The Chair is very pleased to welcome at this time our distinguished friend and colleague from the state of Ohio, who will have considerable influence over this particular area, because of his duties and responsibilities as chairman of the subcommittee over on the Labor Committee.

With that we are very pleased that you came this afternoon, and I recognize my friend from Ohio, Senator Howard Metzenbaum.

STATEMENT OF HON. HOWARD M. METZENBAUM, U.S. SENATOR FROM OHIO

Senator METZENBAUM. I am very happy to be here with you today. I want to thank you for this opportunity to testify before the Surface Transportation Subcommittee regarding an exemption for Amtrak from the Federal Employers' Liability Act.

This is not a new subject for me. When I was a private practitioner, I represented injured railroad workers, and I represented the families of those who had lost their lives. And I am frank to say to you that I chair the Labor Subcommittee which has jurisdiction of the FELA, and I truly do not look favorably on any proposal to remove Amtrak employees from the FELA jurisdiction.

The jurisdiction of the Labor Subcommittee includes any temporary or permanent exemption for Amtrak from the requirements of the FELA, and I do not see that to be a good legislative proposal.

I am pleased that the Surface Transportation Subcommittee has convened this hearing to review the operations of the FELA. I think upon hearing the testimony you will conclude, as I have concluded, that it is good legislation, as is. In short, "if it ain't broke,

don't try to fix it." I am very candid in saying that I am certain my subcommittee will not look favorably on changing the law.

The FELA, the Federal Employers' Liability Act, is a statute designed to help people and protect workers. The system has been in place for 80 years and it has worked remarkably well.

The FELA guarantees justice to injured railroad workers and their families. Railroad workers who lose their arms and their legs in horrible accidents deserve fair compensation, and they are entitled to have their case presented to a jury.

We in Congress, or in a state legislature, cannot possibly put a price tag on an arm, a leg, or a life. We cannot evaluate the suffering. I hear people talk about product liability insurance and talk about workers' compensation insurance, and they figure out that there ought to be a maximum of $250,000 for pain and suffering.

Tell me anybody who thinks that a worker with a life expectancy of 40 or 50 years would be fairly compensated at 10 dollars a week, or 50 dollars a week for the pain and suffering that that individual may experience. We cannot pay a widow and her children enough to console them when they lose the husband, the father.

But I would rather have a jury, people from the community who can understand the nature of the loss, who can feel for the individual, decide on compensation rather than some arbitrary pre-set schedule where there is no room for compassion or wisdom or for understanding.

That is what FELA does. It gives workers their day in court. It allows them to present their case before a jury of their peers. That is the fairest way I know to decide how to compensate injured victims.

I was in the general assembly of Ohio for eight years, four years in the House, four years in the Senate, and I saw the kind of activities that occurred in connection with the Workers' Compensation Act.

I saw where management and labor would negotiate and decide what belonged in the law. Sometimes they did not agree and you had to go out on the floor to decide. But I think the jury has a right to decide that. I think the individual has a right to have his or her case submitted to a jury.

Let us not kid ourselves. Railroad workers are exposed to hazardous risk. And they need this protection, because the railroad industry is a very dangerous industry. In the last 10 years 48,000 railroad workers each year suffered a job-related injury and 86 employees on the average were killed each year.

Thousands of non-employees were also injured or killed each year in train-related accidents. It is perverse to proposed weakening safety measures in such an industry. But that is exactly what Amtrak is proposing to do.

And I must tell you that I think it is somewhat impertinent that we give Amtrak $630 million to go on about their business, and the first thing they do is come to Congress and ask us to change the law to find them money from the backs of injured workers and their families.

Amtrak's major argument for this test exemption is that it will save money. Why is it that the first place the executives look to save money is to take it away from injured workers?

Amtrak officials have admitted that most of the money will come directly from the pockets of workers who have been injured on the job, or their families. Mr. Chairman amd Members of the Committee, that is not a savings, that is an insult. An insult to the railroad workers who perform for Amtrak.

Equally important, this three-year exemption will eliminate the most effective safety incentive in the railroad industry.

When the railroad knows that they have to pay if they make a mistake, they are going to be concerned that they do not make mistakes and see to it that there are safety provisions on the job.

Railroads have taken steps in recent years to increase workplace safety that I believe were brought about in part by the presence of the FELA, and I commend the railroad industry for that.

For example, several workers at an Indiana facility ended up with respiratory problems because they used a new electrical tag process. The FELA suits filed by those workers brought about the identification of the chemical hazard, and led to corrective action by the railroad.

In another case, a worker nearly lost his leg while replacing rails on an extremely hot day. He filed suit under FELA and the settlement of the case contributed to a change in Amtrak procedures so that work was no longer performed under those dangerous conditions.

FELA provides an incentive for railroads to strengthen their safety practices so that accidents like these can be avoided in the future. That is why this issue goes beyond the interests of labor and management.

Lives are at stake. It is totally inappropriate to authorize a test project that will place citizens in greater danger. But then the Amtrak proposal is not really a test. Everyone knows it is just the first step toward a permanent exemption for Amtrak and the eventual repeal of the FELA for the entire railroad industry.

Let me be unequivocally clear. I will oppose the exemption for the entire industry from the FELA, and I will oppose with equal vigor the exemption of Amtrak from the FELA for three years, or two years, or one year, or one week.

I look forward to reviewing the record of this hearing. I do not believe there is any need for an Amtrak exemption from the FELA. But as chairman of the Labor Subcommittee, you can be sure I will be very interested in any legislative proposal relating to the FELA.

I will be interested in the testimony of the other witnesses, and I thank you, Mr. Chairman, for the opportunity to appear before you to testify.

Senator EXON. Senator Metzenbaum, thank you very much. I just have a quick question or two.

First, has your subcommittee in Labor ever conducted any hearings on the effectiveness of FELA? Or do you know of any input to your subcommittee in this area over the years?

Senator METZENBAUM. Since I have been chairman of it, and that is only since the Democrats are back in control of the Senate——

Senator EXON. We remember that.

Senator METZENBAUM. We have not conducted any hearings, and we do not have any planned. But I do not recollect any hearings

that were conducted when the other party was in control of the Labor Committee either, and I have been on that Committee for some years.

Senator EXON. As a former trial lawyer active in this area, you might be in a much better position than this non-lawyer to advise the Chair whether or not there are any other industries that have such laws.

I am not saying that this is bad or good. But are the railroads the only industry that have such a law imposed upon them by the Congress?

Senator METZENBAUM. No, the maritime industry has a similar law.

Senator EXON. Maritime has it.

Senator METZENBAUM. It does not have an FELA as such, but it has the Jones Act, and under the Jones Act workers have the right to submit their cases to a jury.

There are many similarities—rights of maritime employees are well protected under the Jones Act, as they are for railroad workers under the FELA. It is special legislation for that industry.

Senator EXON. There is no such similar legislation, regardless under which name it would operate, that applies to any other, the airline industry, the trucking industry, or anything of that nature?

Senator METZENBAUM. No.

Senator EXON. To your knowledge?

Senator METZENBAUM. To my knowledge there is not. I think the general rules that are applicable in the airline industry have to do with the right to bring a case before a jury.

And I am not exactly certain how the workers' compensation acts apply as pertains to a pilot or a flight attendant who flies over seven or eight or 28 states, whatever the case may be. I am not exactly sure of that.

Senator EXON. Thank you, Senator Metzenbaum. Senator Kasten?

Senator KASTEN. I have no questions.

Senator EXON. Any questions by the other Members of the panel? Senator Pressler?

Senator PRESSLER. No. But if I could get a chance, I would like to make a brief opening statement.

Senator EXON. I will entertain your opening statement in just a moment.

Senator Metzenbaum, I know like all of us you have a very busy schedule. Once again, I thank you for being here, and you are excused.

Senator METZENBAUM. Thank you, Mr. Chairman. I want to tell you, being here does cause me some duress, because I look over at Senator Pressler and he beat me on the tennis court this morning, and I never enjoy that kind of beginning for the day. But other than that, it is nice to see you.

Senator EXON. Well, even those of us who do not have time to play tennis, we do recognize your talent. Senator Pressler is recognized for an opening statement.

OPENING STATEMENT BY SENATOR PRESSLER

Senator PRESSLER. Mr. Chairman, I have an opening statement I will read in the record.

But I wanted to let everyone know that a so-called citizens' group held press conferences in South Dakota attacking me for my stand on this issue last week.

This group claimed that I was endangering railroad safety by considering the possibility of cosponsoring Senator Kasten's amendment.

And indeed, their statements have had just the opposite impact on me and my constituents. Citizen Action is an out-of-state group. We do not even have Amtrak in South Dakota, so people had a hard time figuring out what they were talking about.

When the newspapers dug into it they found that a $50,000 contribution had been given to them by a lawyers' group, and that they really were not much of a citizens' group at all.

I think that this sort of misrepresentation in public life is very serious. This so-called citizens' action group's, backfired as far as I am concerned.

I hope they come back. I invite them back. But I think that there are a lot of false things being thrown around here. The Kasten proposal will not weaken railroad safety. It has nothing to do with railroad safety. I think it is a very reasonable proposal to have a three-year test period for Amtrak FELA exemption.

I support the proposal only as a three-year study, but I think we need to do that. And everything I have seen has indicated that railroad safety is not an issue at all. But I do have some additional remarks that I could place in the record that I will not trouble the Committee with at this point.

Senator EXON. Thank you, Senator. I took it from your statement and being a lawyer yourself, and the lawyer we just heard, that there will be lawyers on both sides of this proposition, as is usual and customary.

Senator PRESSLER. Yes.

Senator EXON. We will call the first panel, Mr. Neal Curtin, Deputy Director, Planning and Reporting, Resources, Community and Economic Development Division of the General Accounting Office, and an individual who we are always glad to have back before the Committee, an expert on railroad matters, the Hon. John Riley, Administrator of the Federal Railroad Administration.

I am sorry. I am advised that Mr. Riley will be on the next panel. I am not sure that he is here yet. In any event, Mr. Curtin, please continue.

STATEMENT OF NEAL P. CURTIN, DEPUTY DIRECTOR, RESOURCES, COMMUNITY, AND ECONOMIC DEVELOPMENT DIVISION, GOVERNMENT ACCOUNTING OFFICE, ACCOMPANIED BY JIM BLUME, STUDY GROUP DIRECTOR; AND TERESA SPISAK, TECHNICAL ANALYST

Mr. CURTIN. Thank you, Mr. Chairman, and Members of the subcommittee.

I thought I should start by introducing my accompanying witnesses today. Mr. Jim Blume was the group director in charge of

our study that we will be testifying on, leading the day-to-day implementation of it, and Ms. Teresa Spisak is our technical assessment, technical analyst who did a lot of the detailed analysis leading to our conclusions in this study. Both of them will be available to help with any detailed questions you might have.

I can summarize my statement, as I understand it will be placed in the hearing record in its entirety. I can summarize it very briefly, I think, and then get on to whatever questions you might have.

Before I get into the findings of our study, though, I thought it would be useful to put our work in context and make sure you understand where we see our work fitting in with the total issue involving FELA and state workers 'compensation systems.

Our report focused on two specific issues, both dealing with costs. First the cost that Amtrak would have incurred under state systems compared to what it actually spent on FELA cases that were closed in 1984. And the second issue was the amount of attorneys' fees that were paid as part of those FELA cases.

It is important, I think, to understand that because we were looking at just the cost issue we did not take a position in this work on which system, FELA or the state system, was preferable.

To make that kind of decision, I think, requires consideration of things besides costs. We see cost as one piece of the puzzle, perhaps a very important piece. But my statement outlined several other issues that we see as things that would need to be debated and considered in deciding on any changes to FELA.

We have not done analysis of those issues. We would be happy to discuss some of our thinking on that, but we are not in a position to offer any conclusions on those at this time.

Turning now to the results of our cost analysis, our report was issued in 1986, and involved a sample of cases that Amtrak closed in 1984, involving FELA payments. Benefits paid under that system were estimated at $24 million in that year.

Had all these claims been paid under either of the two state systems that we looked at, Amtrak would have paid less. We estimated in the case of Connecticut, which we chose as a state paying a high rate of benefits for its workers' compensation, that Amtrak would have paid about $21 million compared to the $24 million.

For Indiana, which we chose as a state with a level of benefits at the low end of the scale, payments would have been about $7 million for the same set of cases, compared again to the $24 million.

I do not want to get into a lot of the detail on our methodology, but we will be glad to talk about that in the question and answer session if you like. I think there are a couple of things that would be worth pointing out about this study.

We made our cost analysis through use of a random stratified sample of Amtrak's FELA cases, looked at 314 cases, compared the actual cost that Amtrak incurred for each case under FELA to a computation of what Amtrak would have paid under the benefit schedules of Connecticut and Indiana.

The numbers that I gave you do not include payments for medical expenses or medical rehabilitation, because those payments are made on an equal basis under either FELA or the state systems. Actual medical expenses are paid routinely. We looked only at additional payments made under the system.

A few observations from our findings, I think, would be of interest. As has been discussed already, the basic difference between FELA and the state systems is that FELA is a negligence statute.

The claimant must show negligence on the part of the railroad, and payments are negotiated through either a series of negotiations between the claimant and the railroad or through court settlements.

State systems, on the other hand, are basically no-fault systems. Claims are paid based on a fixed schedule, regardless of who was at fault.

Because of these differences, there are differences in what payments can be made for. FELA will allow payments for pain and suffering. State systems do not provide for such payments but cover loss of wages.

In my prepared statement we have exhibit A, which gives a lot of detail on the cost analysis. I will not go into much of that detail except to point out a couple of issues that are perhaps of some interest.

We broke out the comparisons by type of disability, and what you see when you look at it that way is that in a state like Connecticut payments are actually higher than FELA for certain categories.

Permanent total disabilities, claimants with those kinds of disabilities, would actually have received more under Connecticut's rules than they received under FELA. For the other categories, and for all categories in Indiana, the FELA payments were higher, and of course came out higher in total.

There are significant variations clearly between what FELA would pay and what the states would pay, but there are also significant variations between the two states in our study. In fact, we chose Connecticut and Indiana to kind of bracket the range of payments that would be expected.

Employees, filing under Connecticut's rules, would have received $15 million more than what they would have received under Indiana's rules in 1984.

There are also significant variations, when we look at it case by case. There are, in fact, some specific cases in our sample in which the employee received more under Connecticut's and Indiana's system than under FELA.

This is because of the nature of FELA where costs are negotiated and determined through court action in some cases that there could be differences in computations. Overall, however, the costs were higher under FELA.

I can summarize just in a minute our findings on attorneys' fees. I think it is important on this issue to know that there is not a lot of good data available on how much was paid in attorneys' fees.

We looked at this issue because the requester that we did the study for was particularly interested. What we had to do was come up with an estimate based on our understanding of how attorneys' fees were paid in these cases, which is basically a contingency fee, depending on the amount of the award, and the information we could get from the Amtrak case files on which of the cases involved the use of attorneys.

What we found, basically, is that for 41 percent of the cases in which Amtrak made payments greater than zero, claimants used attorneys. We estimated that the fees that would have been paid to attorneys for those cases were about $5 million to $7 million, based on a 25 percent to 33 percent contingency fee.

There is really no way to get good data on what the use of attorneys was in state cases. Generally, attorneys are not used. State officials told us that if a case goes to a hearing board, which happens in four to six percent of the cases, the claimant would probably use an attorney. But there is no way to estimate those fees.

That summarizes pretty well, I think, the information in my statement, and we would be glad to take whatever questions you have.

Senator EXON. Mr. Curtin, thank you very much, and without objection we will accept your full statement for the record, and it is very informative.

Let me ask a question or two, then I have about five minutes before I have to run to Armed Services for a vote. And my colleague from Wisconsin has indicated he would be happy to chair in my absence.

Mr. Curtin, supporters of the FELA proposals for Amtrak workers claim that the majority of any savings that would be gained, or certainly most of the savings that would be gained under Amtrak's proposal, would be at the individual worker's expense.

Can you elaborate as to what your feelings are and how the savings estimated by your report would be achieved under a state's workmen's compensation system, as has been suggested for the trial period?

Mr. CURTIN. Where the savings would come from and exactly what the savings would be is going to depend very much on the mix of cases that the railroads incur, and that Amtrak incurs.

What we find is that when we look at state computations, the benefit schedules are fixed depending on the situation in the case. Under that type of situation, employees with the same type of injury and the same situation, the same age, the same marital status, would receive basically the same amount of benefits.

Under FELA, it is going to depend very much on other factors. It could be how good the attorneys are on either side. It could be extenuating circumstances that are brought up in a court case or in a negotiated settlement that are very difficult to compare case by case.

That is one of the basic difficulties of coming to any bottom line conclusion of how much would be saved and where the savings will be. Our analysis kind of brackets those savings, and any type of decision on whether that comes out of attorneys' fees or comes out of the backs, as you say, of the employees is very difficult to do on a global basis.

Senator EXON. Mr. Curtin, as you know, besides covering pain and suffering, the FELA system also makes railroads liable for occupational diseases and illness.

In your research, do you identify or determine the dollar significance of these types of claims?

Mr. CURTIN. Again, a difficult issue to put a dollar amount on.

There were, as I understand it, two cases in our sample of 314 that involved occupational diseases, and our understanding in researching the state systems is that payments would be made under those state systems for those types of diseases, just as they would be made under FELA. And the differences in the payments again depend on the individual case circumstances.

Senator EXON. But that would depend upon the law under the state system, would it not? Would it be possible for one state to be covered, an employee in one state to be covered for occupational illness and not in another?

Mr. CURTIN. Our latest information, and it was true, I believe, in 1984 as well as the latest we had from the OSHA compilation of workers' compensation systems, is that all of the states now cover occupational diseases as well as injuries.

Senator EXON. So that is standard as far as you know in all states.

Mr. CURTIN. The benefit payments will vary from state to state, but the coverage is there.

Senator EXON. The coverage is there.

Mr. CURTIN. Yes, sir.

Senator EXON. I will have further questions for the record that I would like to have you respond to as quickly as you can. That is all the questions I have at this time. Senator Kasten?

Senator KASTEN. Well, Mr. Chairman, I really just have a comment. I think that this panel is at somewhat of a disadvantage.

My understanding is that none of you had anything to do with this particular study. Is that true?

Mr. CURTIN. Mr. Blume is in a different division now in GAO, but was the group director in charge of this study, and Ms. Spisak was the analyst who did all the detailed analysis. And I was in my same position at the time of the study.

Senator KASTEN. Were you in the position—we are interested here in the transaction costs. If we are going to make savings, we have got to figure out ways that injured employees are going to receive compensation in as direct a way as possible.

And there is a feeling, and I think that we are going to show that in this hearing, that the process in this—first of all the adversary situation, secondly the cost of the attorneys on both sides—is not the best process. Amtrak's paying, taxpayers are paying the cost of Amtrak's attorneys in every one of these different cases.

Plus, there is a concern with this whole investigating process whereby the FELA law firm will hire an investigator, and sometimes that investigator or group of investigators are related in one way or the other to employee groups or the local brotherhood group.

Did you look at that whole process of the transaction costs? The time period, how much it costs, fees for inspections or inspectors, what kinds of inspections or inspectors, what kinds of lawyers?

Did you go into this? Or did you kind of just brush over it?

Mr. CURTIN. I'll let Mr. Blume comment on that, and I will add something too, Mr. Chairman.

Mr. BLUME. It was about 66 weeks it took to process a FELA case. I think when you start talking about savings, what you are

talking about are two different statutes that have different intents and different purposes.

The workers' compensation laws were directed at a no-fault approach, were negligence was not an issue. Under FELA you have got negligence, and therefore contributory action by the employer, in this case Amtrak or another railroad, and you have the costs to be borne by the employer, Amtrak, for pain and suffering caused to the individual.

So what we did is we made at the request of at that time Congressman Broyhill to compare two different statutes and show the financial difference. But that does not recognize that there are two different programs that you are comparing. And that therefore that kind of cost comparison is very dangerous, because it is a matter of whether or not you feel that Amtrak pays too little, or maybe you might feel that state workers' compensation programs do not pay enough.

Senator KASTEN. I am not concerned with the dollar award for the back injury. What I am concerned about is the process which an employer and an employee have to go through to end up with that dollar award for the back injury. It is clear that under FELA it is much more expensive.

The question here is, did you take into consideration, in addition to the legal fees, the other fees that are associated with the case? Specifically, did you take into consideration the fees which are paid for so-called investigations of the injury?

Mr. BLUME. No.

Mr. CURTIN. I think that is clearly the right answer. Our figures do not show that.

Mr. BLUME. And that information, by the way, the administrative costs, was really not available from Amtrak either, I might add.

We tried to get some of their administrative costs, even going under a state workers' program——

Senator KASTEN. We are going to see if we can get some of that information from any of these people here today. Obviously this is just the beginning of what will be a detailed investigation, and we might get back to you and ask you for more help. Senator Pressler, do you have questions?

Senator PRESSLER. Yes. Let me ask this. What percentage of these recoveries get to the injured person? I am very concerned about being assured that the injured person gets the money.

What percentage of the recoveries does go to the injured person?

Mr. CURTIN. The only information that we would have on that is the percentage that goes to attorneys. There may be other costs involved.

The information that we used in our study was 25 to 33 percent, as contingency fees given to attorneys.

Senator PRESSLER. What page is that on?

Mr. BLOOM. It is in the appendix and it is on page 19, is where the figures are. And in the body of the report, page 19, the table should have the attorneys' fees.

And in the narrative, it is the last section of the report, page six and seven, has a discussion on how the attorneys' fees work. I am

sorry. It is the pages before that, five and six, have the discussion on attorneys' fees.

Senator PRESSLER. Now, if there was workmen's compensation, how would this compare?

Mr. CURTIN. The information, again, we have no cost data, but we do have some feeling from the States on the percentage of cases which have to use a lawyer.

And that is basically those cases which would go to a hearing appeals board. Connecticut told us, I believe, about four percent, Indiana said five to six percent, in that range.

Senator PRESSLER. As I understand it, under workmen's compensation, the injured person would almost automatically get the payment, whereas in FELA cases between, as I see here, 25 and 31 percent of the payment would go to attorneys in the average case, if there was recovery. There would not be recovery in all the cases. Plus there would be the union related fees for investigations or whatever they are called.

Are there ever anything called finder's fees by the unions, if the unions get paid?

Mr. CURTIN. We did not have any information on that in our case studies?

Mr. BLUME. The only thing the union told us is that they did recommend attorneys to their members when a case was involved. But that is about all that we knew about.

Mr. CURTIN. Another interesting aspect of that is the timing of when payments are made.

Under the State systems, payments begin to flow immediately after the injury. Under FELA, payments are made in a lump sum at the time of settlement, which could be in some cases several years, and on average was 66 weeks, in our sample cases.

Senator PRESSLER. Now, why did you choose Connecticut and Indiana as your worker's compensation programs?

Mr. CURTIN. We looked at the top 11 States in which Amtrak paid claims. Those 11 accounted for 82 percent of the total dollar value of claims.

Of those 11 States, we looked at the benefits paid from the schedule available for worker's compensation, made a determination by going through each of those 11 States that Connecticut had the most advantageous payments for the employee, and Indiana had the lowest level of payments for the employee.

It is possible there are other States with smaller volumes of dollar claims being paid by Amtrak that have higher or lower benefits.

Senator PRESSLER. The title of your study is, Comparison of Employee Injury Claims Under Federal and State Laws. Did you compare the resulting safety effects of the claims under those situations where there is workmen's compensation and where there is——

Mr. CURTIN. Rail safety is one of those issues that GAO is in the process of doing quite a series of reviews for the House Energy and Commerce Committee, and that does not lend itself to very easy answers, we are finding out.

We have not seen through our study or through any other work we have going on that there is any direct link between the type of

compensation system involved and rail safety. We just do not see that one way or the other at this point.

Senator Metzenbaum obviously made a very eloquent argument that there is a link. We have not seen any detailed analysis of that.

Senator PRESSLER. Well, I do not think there is a direct link myself. I hope that one of the witnesses will provide that link for us.

I am all for rail safety and I am for employees getting paid if they have a true injury. But it looks to me as though with this FELA system, the people who are really injured do not get the full payments.

It looks to me like a system that has grown up for one industry, that does not apply to any other industry except maritime, which under the Jones Act is a different matter. I thank you very much.

Senator KASTEN. Senator Adams?

Senator ADAMS. Thank you, Senator Kasten. You indicate that the payments are lower or would be lower by Amtrak in terms of their total cost as compared to the state workmen's comp statute.

Did you make an analysis of whether or not this is because the employees receive a smaller amount? Or that the cost of litigating under FELA, attorneys' fees and so on, made up the difference?

Mr. CURTIN. It is interesting, Senator. In preparing for the hearing today, we pulled together some specific case studies from our sample, and you see some interesting things.

The totals are the way we reported them. Case by case, though, there are situations in which the payment made under FELA to an employee was less than what they would have gotten under the State systems, with or without an attorney.

Senator ADAMS. You are basing that on the State system of there being no litigation cost and a fixed fee schedule for particular types of injuries?

Mr. CURTIN. That is exactly right. The fixed fee schedule in Connecticut and even Indiana, in some cases, even though Indiana was a very low State, depending on the specific circumstances of the case the payments would have been higher for that individual under the State systems. It is a very unusual outcome, and it is because of——

Senator ADAMS. Did you factor in the attorney fee cost? That is what I am asking. In other words, you really, it is comparing apples and oranges if you compare, say, the loss of a leg, workmen's comp to FELA, and the amount the FELA recipient received as compared to a fixed fee schedule, unless you work in the costs on both sides.

Mr. CURTIN. In some cases, even with the attorneys' fees left in, the State system will still have paid more.

In most cases, though, and the total comes out that way. In most cases, Amtrak pays more under FELA, with attorneys' fees included.

Senator ADAMS. What about to the recipients? Because my second question is, I do not see a figure in here for percentage of settlement under FELA, whereas under workmen's compensation you have a very easily checked percentage of settlement.

Did you check a percentage of settlement? Or did you take only litigated cases?

Mr. CURTIN. I am not sure——

Senator ADAMS. You have a series of 10 people who have injuries and therefore file. If they file under workmen's compensation you have a state record of whether they pay attorneys' fees, what they get as an award, and so on.

Now, you may have a variation in attorneys' fees, because some are represented and some are not. The most serious cases tend to be represented. If you take 10 people under FELA, if your records are only those that were settled either just prior to trial or during trial, you have a much higher court and attorney fee costs.

And I am asking you, did you check or factor in those that were settled immediately under FELA as opposed to only the litigated cases?

Mr. CURTIN. The way we did our study was really the other way around from what you discussed, and I think it takes that into consideration.

What we did was draw a sample of Amtrak cases settled under FELA. So the settlement amount is the total amount paid, some of which would go to an attorney, in cases in which an attorney was involved.

We then took the facts of that case and went to Connecticut and Indiana and applied their fixed benefit schedule to that same case. And the amount that would have been paid then under those state systems was compared to the total that was actually awarded under the FELA system.

Senator ADAMS. Gross or net?

Mr. CURTIN. Gross. And the only netting that we did is in the total estimate we showed that $5 million to $7 million was probably paid as attorneys' fees out of a total of $24 million paid for those 1984 cases.

Senator ADAMS. And what is your conclusion, since you are here testifying and it is not clear from this as to why Amtrak would pay more under the FELA?

Mr. CURTIN. I think it is clearly the broader coverage of FELA, in terms of pain and suffering.

The State systems are limited to loss of wages. And there are economic judgments built into their payment schedules of what a reasonable fee would be for the type of injury incurred and the circumstances of that person.

The FELA system is negotiated, case by case. If a good case can be made for pain and suffering or other circumstances, the award can be much higher.

Senator ADAMS. Thank you. I have no further questions.

Senator KASTEN. Thank you very much.

Senator PRESSLER. Let me just ask one more question if I may here.

Now, just for clarification, the total recoveries were how many million, and how much were the attorneys' fees?

Mr. CURTIN. Our estimate was that $5 million to $7 million, depending on which contingency fee estimate you want to use, $5 million if you use 25 percent contingency fee, $7 million if it is 33 percent fee.

That is based on all the cases in which an attorney was involved. There were 59 percent of the cases that did not have attorneys.

Senator PRESSLER. And how much were the attorneys' fees?

Mr. CURTIN. That $5 million to $7 million is our estimate of what the fees were.

Senator PRESSLER. How much was recovered?

Mr. CURTIN. Out of a total of $24 million.

Senator PRESSLER. That is $24 million was recovered. In other words, a good bit of the recovery is going to lawyers. Do we know how much went to the investigating committee?

Mr. CURTIN. No. We just do not have that in our database.

Senator PRESSLER. I see. So the point is that the guy who suffered the injury, presumably, is getting less under FELA than he would under workmen's compensation?

Mr. CURTIN. That is entirely possible. Our totals are the way they came out. Case by case they can be quite different.

Senator PRESSLER. I think that is the basic point. Is this a hearing about benefits to people who are injured, or is it a hearing about payments to law firms and union investigating firms and so forth? And that is the way the question is framed for me.

Senator KASTEN. Gentlemen, thank you very much.

[The statement and questions and answers follow:]

STATEMENT OF NEAL P. CURTIN, DEPUTY DIRECTOR, RESOURCES, COMMUNITY, AND ECONOMIC DEVELOPMENT DIVISION, GAO

Mr. Chairman and Members of the Subcommittee: We appreciate the opportunity to discuss the findings of GAO's 1986 report comparing Amtrak's payments for employee injury claims under the Federal Employers' Liability Act (FELA) with the potential costs of operation under state workers' compensation programs.[1] Railroad employees who are injured on the job receive compensation under FELA. Almost all other workers come under the jurisdiction of the state workers' compensation laws. Because the federal government provides financial support to Amtrak, GAO was asked to (1) compare Amtrak's costs for employees' claims settled under FELA with the potential costs of operation under state workers' compensation systems and (2) estimate the amount of money Amtrak claimants have spent on attorneys' fees.

To make our comparisons, we selected a random, stratified sample of all Amtrak FELA employee injury claim cases closed in calendar year 1984 and asked Amtrak to complete a questionnaire providing selected data on each case for our review. We then identified the 11 states in which Amtrak's 1984 FELA payments were the highest—accounting for 82 percent of its total FELA costs in that year—and selected Connecticut and Indiana, whose benefits were the highest and lowest, respectively, among these states. For each of the 314 cases in our sample, we computed the benefits that would have been paid if Connecticut's and Indiana's compensation system had been used.

In summary, our August 1986 report demonstrates that Amtrak's payments for employee injury claims closed in 1984 would have been lower under both Connecticut ($3 million) and Indiana ($17 million) rules than Amtrak's total payments ($24 million) under the FELA system. We estimated that settlements for all 1984 FELA cases with representation by an attorney totaled $21 million, for which the total attorneys' fees ranged from $5–7 million.

Aside from costs, FELA and the state compensation programs also differ in treatment of liability, coverage, and approaches for determining and paying out benefits. Our testimony today provides a brief description of the key differences in the programs, an overview of our findings on costs, and some observations on other factors that should be taken into account in an overall comparative assessment of FELA and state workers' compensation programs.

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[1] Amtrak: Comparison of Employee Injury Claims Under Federal and State Laws (GAO/RCED–86–202).

BACKGROUND

FELA—which covers rail employees—was enacted in 1908, before any state workers' compensation laws were passed, and was last significantly amended in 1939. The FELA program differs from state compensation programs in several important respects.

Treatment of liability and determination of benefits

FELA is a negligence statute; the employing railroad is liable for damages that result from the negligence of its officers, agents, and employees and from deficiencies in equipment or facilities. The amount of damages is determined through negotiation or litigation for each individual case. Unless the railraod violated certain federal safety statutes, damages are to be reduced by the percentage of the injured employee's own negligence. If a negotiated settlement cannot be reached, the claimant may proceed to litigation.

State workers' compensation system operate on a "no-fault" basis. No determination of negligence is made, and the cause of the accident or illness does not affect the amount of compensation. Each state established a fixed schedule of benefits based on the specific injury and duration of disability. The employer's insurer pays those benefits to the disabled employee if there is no dispute over the facts in a specific case. If there is disagreement over a factor that affects the amount of compensation, such as whether the employee has a permanent impairment, the employee may request a hearing before the state's workers' compensation agency and may appeal that decision to the state court. Theoretically, employees in the same state with identical injuries, salaries, and loss of time from work would receive indentical benefits. However, benefits would vary among different states.

Difference in coverage

Both FELA and state workers' compensation programs provide coverage for the medical costs of employee's care and rehabilation and for the loss of wages. FELA additionally covers losses due to pain and suffering related to the injury. Because both systems cover employees' medical costs, we did not include those costs in our analysis. Our analysis included payments covering loss of wages for both systems and, for FELA only, pain and suffering.

Approach to payment of benefits

Amtrak settlements under FELA are one-time, lump-sum payments. For FELA cases closed in 1984, the average amount of time that had elapsed between the date of injury and the date of settlement (payment) was 66 weeks. Settlements under a state system—at least for disability cases—typically result in a series of payments, often stretching over a number of years. We found that in the majority of cases, Connecticut and Indiana began providing benefits the same year an injury occurred.

COST FINDINGS

After considering the differences in the FELA and state systems, we estimated the cost of settlement payments under the systems and the attorneys' fees for FELA cases.

Estimate of settlements payments

We estimated that Amtrak paid a total of $24 million under FELA for employee injury cass closed in 1984. This was the latest year for which data were available at the time of our review. In comparison, we estimated that Amtrak would have paid $21 million, or $3 million less, if Connecticut's rules had been applied to all cases. If Indiana's rules had been applied, Amtrak would have paid $7 million, or $17 million less. (See exhibit A.)

Our analysis was based on the estimated costs of benefits paid by both systems. We did not include payments for employees' medical care and rehabilation, which are based on reimbursement of actual costs under both systems. In order to adjust for the differences between FELA and the state programs in settling cases and paying out benefits, all settlement amounts in our report are expressed in 1984 dollars, and the state program payments are assumed to begin in the year the injury occurred. Injuries in our sample of FELA cases closed in 1984 occurred between 1975 and 1984. Accordingly, we calculated the 1984 value of both pre- and post-1984 payments and payment streams.

I want to emphasize that our analysis applies only to Amtrak cases closed in 1984. The data cannot be projected to Amtrak's experience in other years or to the experiences of other railroads.

We found that payments differed, not only between FELA and state systems, but between the two state systems. Under FELA, both liability and the amount of compensation are subject to negotiation. In the Connecticut and Indiana programs, payments to an employee or survivors are based upon established disability categories: temporary disability, permanent partial disabiity, permanent total disability, and fatality. For each category, exhibit A compares the 1984 Amtrak FELA payments with the potential payments under the respective rules in Connecticut and Indiana.

Under Connecticut's rules, we estimate that Amtrak would have paid $12 million for permanent total disabilities—$3 million more than the estimated cost of $9 million under FELA. However, Amtrak's estimated FELA payments for all the other categories were $6 million higher than our estimates for Connecticut. Across all categories, than, Amtrak's estimated costs under FELA were $3 million higher than the costs we estimated for the same cases under Connecticut's rules. Our estimated costs for all categories under the Indiana program indicated that Amtrak's payments for these cases under FELA were $17 million higher.

Connecticut and Indiana represent the highest and lowest benefit programs among the 11 states where Amtrak made the highest payments—82 percent of its total payments in 1984. Consequently, our results do not necessarily reflect the higher and lower benefit extremes among all the states programs.

Estimate of attorneys' fees paid by Amtrak FELA claims

FELA is a negligence liability system under which claimants may be represented by an attorney during their negotiations with employers and may proceed to litigation if they do not negotiate a settlement. We were not able to collect data on the portions of Amtrak's FELA settlements that injured employees paid to their attorneys. It is difficult to precisely estimate attorneys' fees on a nationwide basis. However, we were able to develop broad estimates that we believe may be useful in considering this issue.

According to Amtrak officials, attorneys who represent FELA claimants generally receive between 25 and 33.3 percent of the final settlements as their fee, and if a case proceeds to trial, the fee may be 40 to 50 percent of the award. Labor union officials informed us that attorneys to whom unions refer members usually charge a 25 percent contingency fee to estimate the amounts that claimants paid for attorneys' fees, we calculated 25 and 33.3 percent of the settlement amounts in the 1984 cases using attorneys.

We estimated that 41 percent of Amtrak's cases closed (1,349) in 1984, when the settlement was greater than zero, were represented by an attorney. As shown in exhibit B, 75 to 87 percent of claimants with payment disabilities or cases in which a fatality occurred were represented by an attorney, as were 23 percent with a tempoarary disability and 42 percent with no disability.

We estimated that settlements for all 1984 cases with representation by an attorney totaled $21 million. Therefore, we estimated that total attorneys' fees would have ranged between $5 million (25 percent) and $7 million (33.3 percent).

We were unable to compare the attorneys' fees under FELA with thsoe under the state systems. There were no readily available data on attorneys' fees paid by claimants under state systems. However, Connecticut and Indiana officials told us that in some cases, claimants in state workers' compensation systems also are represented by legal counsel. Employees who appear before state hearing officers or who appeal their cases to the state court are almost always represented by attorneys. In fiscal year 1985, approximately 4 percent of Connecticut's claims received formal hearings. The Executive Secretry of the Indiana Industrial Board estimated that 5 to 6 percent of Indiana's annual cases receive hearings. State officials said that these are also contingency fee cases, so a comparable portion—i.e., 25–33 percent—of these awards would be allocated toward attorneys' fees.

OTHER FACTORS TO CONSIDER IN COMPARING FELA WITH THE STATE COMPENSATION PROGRAMS

The data from our report on the costs of FELA and the state program will be useful in considering changes to the current system. Any overall evaluation of FELA and state workers' compensation programs, however, will have to balance the issue of cost along with numerous other factors. In the course of our work in 1986 and in preparation for this hearing, we were made aware of a number of these issues, and I thought it would be useful to mention some of them to help put our report in prespective.

What type of system, a negligence statute such as FELA or a state "no-fault" system, best protects workers?

Should the railroad industry continue to operate under a workers' compensation system different than most other industries?

Is variation in benefit payments from state to state under state systems better or worse than the variation caused by individual FELA benefit payment determinations?

Are there significant differences in the administrative and legal burdens under FELA and state systems?

What are the implications of treating Amtrak differently from other railroads by using a workers' compensation system?

These issues are difficult judgment calls that do not lend themselves to conclusive analysis. The fact that Amtrak paid more under FELA than it would have under the state systems is just one piece of a complicated puzzle.

Mr. Chairman, this concludes my prepared statement. I welcome the opportunity to answer any questions that you may have.

[EXHIBIT A]

COMPARISON OF ESTIMATED 1984 AMTRAK FELA PAYMENTS AND ESTIMATED PAYMENTS IN CONNECTICUT AND INDIANA BY DISABILITY CLASSIFICATION [1]

[In millions of dollars]

Disability classification	Estimated Amtrak FELA payment	Connecticut		Indiana	
		Estimated payment	Difference [2]	Estimated payment	Difference [2]
Temporary [3]	$7.7	$2.9	$4.8	$1.4	$6.4
Permanent partial [4]	6.8	6.1	.7	1.3	5.5
Permanent total [4]	8.5	11.7	−3.2	3.6	4.9
Fatality [3]	.8	.4	.4	.3	.6
Total payments	23.9	21.2	2.7	6.5	17.4

[1] Medical costs are not included, nor are Amtrak cases settled for amounts between $1 and $99 because of the small sample size.

[2] The difference is calculated by subtracting the state's payment from Amtrak's payment. If the results is a negative(−) number the state payment is larger; in all other cases, Amtrak's payment is larger.

[3] Numbers may not total because of rounding.

[4] Assumes that no nonfatality cases that Amtrak settled for less than $10,000 would be classified as permanent partial or permanent total.

Note: Estimated payments are computed to a 95-percent confidence level. Sampling errors at this level are shown in appendixes II and III of GAO's report entitled "Amtrak: Comparison of Employee Injury Claims Under Federal and State Laws" (GAO/RCED–86–202).

[EXHIBIT B]

PERCENTAGE OF 1984 AMTRAK CASES REPRESENTED BY AN ATTORNEY BY DISABILITY CATEGORY

	Percentage with attorney	Percentage without attorney
Disability category:		
None	41.8	58.2
Temporary	22.7	77.3
Permanent partial	80.7	19.3
Permanent total	87.0	13.0
Fatality	75.0	25.0

GAO

United States
General Accounting Office
Washington, D.C. 20548

Resources, Community, and
Economic Development Division

July 25, 1988

The Honorable Ernest F. Hollings
Chairman, Committee on Commerce,
Science, and Transportation
United States Senate

Dear Mr. Chairman:

Your July 11, 1988, letter asks us to respond to several questions provided by Senator Bob Kasten as a follow-up to the Commerce Committee's hearing on the Federal Employers' Liability Act (FELA) in relation to the National Railroad Passenger Corporation (Amtrak) on June 22, 1988. In our testimony,[1] we discussed the findings of our 1986 report comparing employee injury claims under FELA with the potential costs of operation under state workers' compensation programs.[2] Senator Kasten's questions centered around the exclusion of employees' medical costs in our analysis. In responding to Senator Kasten's specific questions, I will discuss our basis for excluding medical costs from our analysis.

Do both FELA and the state systems provide medical payments on a continuing basis for so long as medical costs are incurred by injured employees?

State compensation systems usually provide medical benefits for employee injuries without a time limit. In contrast, medical costs are paid under FELA only until a final settlement is reached. The employee would be responsible for any medical costs incurred after a FELA settlement, according to an Amtrak claims official. However, compensation for any potential medical costs anticipated after settlement may be a consideration in the negotiation of a final FELA settlement.

In our analysis of FELA cases closed in 1984, we excluded employees' medical costs because they were covered by both Amtrak and state systems. Due to the length of time needed to reach final settlement under FELA, our analysis assumed

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[1]Comparison of Amtrak Employee Injury Settlement Costs under the Federal Employers' Liability Act (FELA) and State Workers' Compensation Programs (GAO/T-RCED-88-49)

[2]Amtrak: Comparison of Employee Injury Claims Under Federal and State Laws (GAO/RCED-86-202).

that most medical costs were incurred before settlement and were therefore covered. For the FELA cases closed in 1984, our study found that the average amount of time that had elapsed between the date of injury and the date of settlement was 66 weeks. According to the Amtrak claims official we interviewed, the overwhelming share of medical costs are incurred, and eligible for payment, before a final FELA settlement is reached.

Although state workers' compensation systems provide payment for actual medical costs, wouldn't a settlement or verdict in a FELA case tend to force the parties or a jury to estimate future medical costs, therefore, increasing the chance of error to the detriment of either the injured employee or the employer?

Compensation for any potential medical costs anticipated after a FELA settlement may be a consideration in the negotiation of the final settlement, according to the Amtrak claims official. To the extent that compensation for future medical costs differs from actual medical expenses incurred, either employee or employer would benefit at the expense of the other. Our analysis of FELA cases closed in 1984 included compensation for loss of wages, for pain and suffering, and any future medical costs that might be considered in the final settlement of the cases. We were unable to adjust the final settlement amounts because we could not identify the amounts related to each component. However, future medical costs, if considered at all, are a small component of the final settlement since the overwhelming share of medical costs are incurred before settlement. Thus, we do not believe future medical costs would materially affect the results of our analysis.

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We appreciate the opportunity to assist your committee. If you have any further questions on our work in this area, or if we may assist your committee in other areas, please contact Ms. B. Ann Kleindienst, Group Director, at (202) 366-1805.

Sincerely yours,

Neal P. Curtin
Deputy Director

Senator KASTEN. Our next witness is Mr. John Riley. Mr. Riley, we welcome you to the Committee.

Our witness is John Riley, the Administrator of the Federal Railroad Administration. We welcome you and look forward to your testimony.

STATEMENT OF HON. JOHN H. RILEY, ADMINISTRATOR, FEDERAL RAILROAD ADMINISTRATION, ACCOMPANIED BY MARK LINDSEY, CHIEF COUNSEL

Mr. RILEY. I thank you for the invitation. I especially thank the Committee for accommodating the time problem I have today on that flight. I really appreciate your getting me on an early panel.

With me today is Mr. Mark Lindsey, who is our Chief Counsel at the Federal Railroad Administration. Mark is a practicing lawyer, so he is the guy we have been talking about all morning. I am a born-again lawyer.

Mr. Chairman, let me say at the outset that I firmly support the Kasten proposal. Amtrak is the perfect candidate for a study comparing FELA and the state workers' compensation systems for two reasons.

Amtrak operates in more States than any other rail carrier. And second, because Amtrak is publicly funded, any savings that result from the experiment will accrue back to the public as a whole.

But I want to make it equally clear that FRA's support for this amendment is not driven only by fiscal considerations. For too many years, railroad shippers and consumers have paid the bill for FELA, an archaic injury compensation system that leaves many employees with no benefits at all, while burdening railroad companies with costs out of proportion to those borne by their trucking, bus, and airline competitors.

And the real value of the test proposed by this amendment, and this Senator, lies in its ability to resolve once and for all the charges that have been levied against the FELA system for so many years.

Now, from a public policy perspective, any effective injury compensation system should meet five common sense criteria. First, the system should ensure that every man or woman who suffers a workplace injury receives compensation regardless of fault.

Employees have that guarantee in every other American industry. But because of FELA, railroad workers are the one exception. Unlike the state compensation systems, all of which are "no-fault"—FELA denies recovery to the injured employee unless he can establish that his injuries resulted from the company's negligence. Even then, the employee's recovery is reduced by the degree to which his own negligence contributed to the injury.

As a result, many employees injured in the railroad workplace receive no compensation whatsoever. They have to depend entirely on personal resources or public assistance.

Over the past four years, approximately 22 percent of all employees who went to trial with major injury claims of $500,000 or more recovered nothing. And where damages were awarded, recoveries vary widely and unpredictably depending on the assessment of comparative negligence.

Now, the use of negligence as a litmus test for employee injury recovery has been rejected in every state and in every Congressional action on employee compensation for the last 49 years. FELA is an anachronism, and employees as well as companies suffer because of it.

Second criterion. An effective injury compensation program places fair and equitable burdens on competing industries, which is something that FELA definitely does not do.

Amtrak's competitors in the air and bus industries are governed by State compensation laws, and the $48 million Amtrak would save under the Kasten amendment over three years is a tangible measure of the competitive disadvantage Amtrak faces under the burden of FELA.

Industry-wide, the competitive disadvantage for the freight railroads over the same three-year period is in the hundreds of millions of dollars. And make no mistake about who pays that bill. It is paid by consumers. It is paid by the people who buy commodities that move by rail.

Now, this is a particularly timely hearing because of the extent to which the competitive disadvantage imposed by FELA is worsening. The chart on my right, I think, tells the story.

Between 1979 and 1986, the cost of the FELA program increased a little under 100 percent, despite the fact that employment in the

industry is down 41 percent and the number of employee injuries is down 66 percent.

Those are the trend lines of a program that is not working and they do not bode well for the industry's competitive future.

Third, and I think very important, an effective compensation program resolves cases quickly and provides injured employees with rapid access to compensation benefits.

The elimination of fault as a matter of dispute greatly simplifies the resolution of the state compensation cases. Companies can usually begin the payment of benefits shortly after an injury without compromising their legal position.

In the normal case, many, if not most, State compensation laws require the payment of initial benefits within a short timeframe, usually 30 days. That is quite a contrast to the five-and-a-half years the GAO study found under FELA.

Now, FELA represents the opposite extreme. The need to establish and apportion fault necessitates lengthy discovery proceedings and complicates settlements. And because the company's liability for damages remains uncertain until judgment or settlement, there is no incentive and no requirement for the immediate payment of benefits.

Equally important are the differences between the forums in which these cases are resolved. FELA disputes are resolved in the courts. The parties confront the same delays and backlogs from crowded dockets that all other litigants have to deal with. And if a case goes to trial, both parties have a broad right to appeal.

State compensation cases are resolved in a different and much more efficient manner. In recognition of the injured employee's need for immediate assistance, virtually all states have created special tribunals that deal only with injury compensation cases.

These hearings do not involve the lengthy docket delays that occur under FELA, and the cases are heard under simplified, more informal procedures. The state compensation statutes have been specifically designed to provide what FELA cannot guarantee, a rapid hearing for the injured party, and an early commencement of benefits.

The fourth criterion. Any effective compensation system provides incentives for immediate rehabilitation and, wherever possible, a speedy return to the workplace. State compensation laws do this, FELA does not.

The FELA system offers no incentive for employers to finance rehabilitation before their liability is established, either at trial or in settlement. In contrast, under the state compensation laws, there is every reason for employers to finance immediate rehabilitation. Their liability is not in question and they can limit their damage exposure by doing it.

From the employee's perspective, the incentives are no different. When fault and damages have to be assessed at trial or by settlement, the system provides incentives for the employee to enhance his litigation posture by delaying rehabilitation to the extent possible. Not because he wants to do it, but because he has to do it.

State compensation laws provide exactly the opposite incentive. Because damages are fixed by schedule and liability is not in question, there is every incentive for employees to adopt a rehabilita-

tion schedule based solely on their medical needs as opposed to jointly on their medical and legal needs. And that ought to be the objective of a good system.

Fifth and finally. An effective compensation system minimizes the extent to which lawyers' fees and administrative expenses eat into an employee's recovery and a company's resources.

By eliminating the complex issues of fault and contributory negligence, by utilizing compensation schedules and by resolving disputes before hearing officers rather than judicial bodies, the state compensation programs limit the extent to which an employee's recovery is diminished by attorneys' fees. FELA does exactly the opposite.

Now, we have heard Amtrak's estimate, and I believe it is conservative from my own experience is that between $5 million and $7 million of the $21.2 million it paid to employees with legal representation in 1984 went to attorneys' fees.

But that does not include the legal expenses Amtrak sustained in defending those cases. Nationwide, at least 30 cents of every FELA dollar goes for lawyers' fees and administrative costs, and employees who appear to recover large FELA judgements often end up behind their counterparts under state compensation programs once attorneys' fees are deducted and the time value of money is calculated because of the long delays under FELA litigation.

But the point can be made more simply. I do not know of any independent analysis of FELA which has failed to conclude that the legal expenses and court costs of the state compensation programs are significantly less than those under FELA.

I have personally tried cases under both the state compensation system and the tort-based system, and just from my own experience I can tell the Committee that there is just no comparison between the time it takes to try cases under the tort-based system, the complexity of the issues or the billings involved.

FELA is a very good program for litigators like myself. But from a public interest perspective, the state systems with their universal coverage better serve both the employee and the industry and, in truth, it is their interests which ought to be primary.

Now, in concluding, there are just a couple of general points I would like to make about the arguments that have been raised on behalf of FELA, and points that I think ought to be made.

The first argument that has been raised is that railroad employees need a Federal system because their jobs take them across state lines into various states.

Well, interstate service is not unique to the railroad industry. Airline employees have interstate responsibilities and they are covered by state compensation systems.

The bus industry operates across state lines and their employees are protected by the state systems. The trucking industry crosses state lines and its employees are protected by the state compensation systems.

And it is interesting to note that none of the employees in these other industries and none of those companies, are coming before this Committee and asking if they can be included under FELA.

Now, the second point I would like to address, and then I will yield for questions, is what I think is the weakest argument that

has been offered on behalf of FELA and that is the argument that it is somehow a safety statute.

Having lived with railroad safety closely in the last four-and-a-half years, I absolutely join with the GAO witnesses in saying that I see no connection between FELA, or any other compensation statute, truthfully, and safety.

To begin with, it is not a public safety issue because FELA has nothing to do with the public. FELA does not cover passengers, it does not cover members of the general public.

It covers only workplace injuries. And to the extent it has any incentives at all, they apply only to that one narrow category of safety, although a very important one.

But second and more important, simple logic confirms that a no-fault program like the state programs is a much stronger safety incentive than a fault-based program like FELA, because under a fault-based program the company is only liable for the negligence of its own officers and agents. It has no liability for employee injuries caused by an employee's negligence or mistake.

But under the State no-fault systems, the company is absolutely liable for any injury, regardless of the cause. It pays for its employees' negligence and, as a consequence, it should be obvious that that kind of system, the state system, provides a much stronger incentive for companies to train and supervise their employees than a system like FELA, which essentially absolves the company from responsibility for many of its employees' actions.

Now, Mr. Chairman, I honestly do not believe these compensation programs have very much effect on safety of any kind. But to the extent that they do, no-fault compensation programs clearly provide a much stronger incentive than the FELA-type program.

And that is probably why out of 133 industrial groupings in this country, all but one have moved to no-fault workmen's compensation coverage. Those numbers speak for themselves.

They support a broad consensus that the state compensation systems are a better safety incentive and a better employee compensation mechanism than the fault-based systems they replaced.

And again, it is significant to note that none of the other 131, and the merchant marine people are a little bit of a hybrid, is up here asking to be included under FELA.

Now, Mr. Chairman, a final comment. Unfortunately, FELA has become an emotional issue. And that is too bad. Because it is one of those issues where, despite a broad recognition that the system does not work very well, any effort to discuss its problems is certain to precipitate a charge that those who are seeking reform are somehow anti-employee or anti-compensation.

And if I have done nothing else this afternoon, I hope I have been able to demonstrate that the issue is a lot more complex than the conventional labor-management rhetoric implies, and that many of us who would like to see this system reformed are as concerned about its impact on the employee as we are about its impact on the companies.

And I congratulate the Committee for taking a look at this. Obviously, I do not think any of us are naive enough to believe that Congress would be able to deal with an issue of this complexity this year or in the short run.

But the Kasten proposal provides a unique opportunity to sort out the conflicting claims and to develop a database that will measure with certainty what the impact of FELA reform would be.

And I think that data is well worth having. I congratulate the Committee for seeking it. I think from the time we were all young, we were, taught to ask questions. I think this amendment represents exactly that.

I will just conclude with something I saw about an hour ago, reading an article. Mr. Justice Douglas, who was one of the most brilliant men, I think, to ever serve on the Supreme Court, once wrote in a case that FELA was "a crude, archaic, and expensive system, as compared with the more modern systems of workmen's compensation."

That is absolutely true, and he said that in 1943. It really is time for us to move forward into the 1980s. Thank you.

Senator KASTEN. Mr. Riley, we thank you very much. I want to ask you the same question we asked to the GAO people.

In terms of the transactions costs, the delay and the costs and the problems, have you either from your own practice or your work now with the Federal Railroad Administration, can you help us understand the cost not only of the trial lawyer or the FELA lawyer but also of the so-called investigating process and how these investigators or investigations take place?

Mr. RILEY. Well, there are three elements. Really there are three elements of cost that are involved in any trial.

There are the lawyers' fees, there are court costs which are normally minimal and then there are investigative fees, and they include expert witness testimony, medical examinations and investigators' work.

Now, you asked the question earlier, are there finders' fees kicked back to agents? The answer to that is that I do not know for certain. You know, the folklore says yes, but that would be a very serious ethical violation and I certainly would hope not. Nonetheless, you hear the stories.

But remember that we talk about the attorneys' fees being deducted from the employee's recovery. The attorneys' fees are deducted but the employee must also pay all of those costs, and they are deducted in most cases separately from the percentage that goes to the lawyer.

So the amount by which the individual's recovery is reduced under FELA is well in excess of the percentage that goes to attorneys' fees.

Senator KASTEN. Senator Adams?

Senator ADAMS. Thank you very much, Senator. Mr. Riley, it is nice to see you again.

Mr. RILEY. It is good to see you too, Senator.

Senator ADAMS. Do you believe in State insurance no-fault laws?

Mr. RILEY. I do, as a matter of fact.

Senator ADAMS. You think they have worked well in Massachusetts and Connecticut?

Mr. RILEY. Well, the State insurance no-fault laws are often hybrids. They are not the pure no-fault laws that workers' compensation laws are.

When I was in Minnesota, I argued for an absolutely pure no-fault law. If they are pure, they work well. But if they are hybrids and mixed laws, as in the States that you have cited I think that they will work spottily. I am trying to come up with a better word than spottily, but perhaps inconsistently.

Because there is still much fault litigation under those two laws the no-fault portion is a very small percentage of the overall claims.

Senator ADAMS. Are you familiar with the overall system, and I ask the question for information, whereby a State compensation system may provide the alternative of suing as well as or in alternative to accepting workmen's compensation if negligence of the employer is involved?

Mr. RILEY. I am not, Senator. The one program I am familiar with that does that is the merchant marine program, which is why I said before that it was a hybrid.

The merchant marine program is an opt-in opt-out type program. I do not know of any State laws that do that, but I am somewhat in your position. It is possible. I just do not know about it.

Senator ADAMS. You stated that there would be a variation in trial results or litigation results under FELA court by court. I looked at the GAO report and it says that on Amtrak they estimated that it paid $23.9 million for employee injury cases closed in 1984.

Now, payments for medical expenses are not included in either of these, which sort of makes the thing suspect to begin with, because medical expenses are a major portion of workmen's comp.

But this is the point that I want to ask you about. We estimate that under Connecticut's rules, Amtrak or its insurance company, if it were not self-insured, would have paid $21.2 million for the cases. So they would have saved $2.7 million.

Under Indiana's rules, Amtrak payments would have totaled $6.5 million, a difference of $17.4 million. So is it not, if we go to the State compensation laws, all dependent upon which State you happen to be injured in?

And are not the variations staggering based upon the individual State workmen's comp statutes throughout the country?

Mr. RILEY. The answer to that is that it is true to a degree, but you get exactly the same variation under FELA. And the reason is that the FELA cases are tried in the courts of the various states.

The FELA judgments reflect the same variations in jury trends that the state schedules are designed to reflect, only it is worse under FELA because under the state compensation trials you do have a schedule figure which promotes uniformity among cases in that state.

Under FELA, because of comparative negligence, the same injury can put you all over the lot for recovery. And that is sort of my basic problem with it, Senator.

Senator ADAMS. Well, the problem that I would like to have you comment on with regard to your answer is that State workmen's compensation laws are not necessarily tied to the jury trial results but are generally based upon the degree to which you have hazardous industries within your State.

In other words, compensation figures will vary greatly from western States to eastern States, though jury results may not, depending upon urbanization or not.

Now, railroads run across large areas of the country. Would you pin the recovery to what particular State the employee happens to be in when the injury occurs to the terminus of the railroad? Or where?

Mr. RILEY. You can treat that exactly the same way I think it is treated in the air, bus, and truck industries.

You could actually even go beyond that to give the employee a choice of forums based on his residence or the site of the industry, and I think you would still have a more efficient system.

Indiana and Connecticut are the classic examples. Indiana is well-known as a low jury trend state. Connecticut is a very high jury trend state. And the compensation formulas reflected in the GAO studies reflect the same trends.

You are absolutely right that the presence of hazardous industries in a state is one of the factors that they weigh. Generally speaking, though, the compensation schedules align very closely with two things, cost of living and jury trends.

And you will find the same general types of fluctuations and FELA judgments that you will find in state compensation schedules, more or less.

Senator ADAMS. I place it on a different basis, and I would like to have you comment on it.

If you have a largely rural State with one urban center, which is basically this country from the eastern seaboard and take it to California, your jury trial results will be high in the urban center. But the State compensation system will generally be lower, because they will reflect the Indiana end of the system rather than the Connecticut end of the system. Is that not true?

Mr. RILEY. I think that is absolutely true. But that still is less of a deviation than you get in FELA where about a quarter of all of the people who have serious injuries get absolutely nothing because they cannot establish fault.

So you are absolutely right. And you are talking about two imperfect systems. But FELA is a far more imperfect system, and I do not know that we have yet defined perfection.

Senator ADAMS. Well, I agree with you, Mr. Riley, very much on that, that we have not got a perfect system.

But when you mentioned those statistics on litigation and the 22 percent not recovering at all because of comparative negligence, those will be the very largest of cases in which you and I as trial lawyers know you will be taking the most extreme of positions. Is that not correct?

Mr. RILEY. Well, I do not think I would be prepared to categorize the cases without looking at them.

In three quarters of the cases the employee won, and in a quarter he got nothing. And I am not prepared to say that all the ones who lost were taking extreme positions and the ones who won did not.

I mean, there is some of that, but——

Senator ADAMS. The only reason I ask is because they define their study in terms of cases over $500,000——

Mr. RILEY. Oh, yes. I did not take that from their study. I will be glad to supply the source material on that for the record.

Senator ADAMS. I would appreciate it if you would do that.

Mr. RILEY. I would be glad to.

[The following information was subsequently received for the record:]

The source for the statement that 22 percent of the FELA claims that went to trial in the past four years actually received no compensation is a report issued by Loving Associates Ltd. which was prepared on behalf of America's railroads. The Loving Associates Ltd. discussion of this issue was in turn based on an ongoing study being conducted by the Association of American Railroads ("AAR") and on other data available to the AAR. The AAR survey has sought information from its larger member railroads on all cases in which settlement was reached in an amount of $500,000 or more, or in which a jury verdict was reached. The bulk of the information has now been collected and the data indicates that in 21.8 percent of the cases in which a jury verdict was received, the jury found in favor of the defense. A defense verdict is considered to be a case where no damages were awarded or where the damages awarded were reduced to zero due to a finding of 100 percent contributory negligence on the part of the employee. Appeals are pending in some of these cases. This survey data is corroborated by other data available to the AAR claims department which shows defense verdicts in jury cases have ranged between 19 and 33 percent in the years between 1979 and 1987.

Senator ADAMS. Thank you, Mr. Riley. I have no more questions.

Senator EXON. Thank you, Senator Adams. I understand you have to catch an airplane, Mr. Riley. I will submit some questions to you for the record, and we appreciate your being here. I assume there are no further questions.

Mr. RILEY. I thank you very much. I am not going to say anything more about last hearings because every time I do there is another one. So maybe if I do not say it this time, there will not be any more.

Senator EXON. I remind you, Mr. Riley, that you are the Federal Railroad Administrator. There is an Amtrak, but go ahead and catch your airplane.

Mr. RILEY. Let me say, if Amtrak could get me to L.A. by tonight I would be on it.

Senator EXON. Well, the President is here, he can accommodate you. Thank you very much.

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR EXON AND THE ANSWERS THERETO

SENATOR EXON: In your first contention of your 5 point criteria for any effective injury compensation system, you suggested during your testimony that there is a need for every man or woman who suffers a work place injury to be compensated regardless of fault. Rail labor unions argue for the necessity of a jury trial to protect the rights of the workers. Could you elaborate on how, specifically, companies benefit from a no-fault compensation system?

ANSWER: The argument that a jury trial is necessary to protect the rights of injured workers to fair and adequate compensation for job related injury has been rejected in every state, and in every Congressional action on workers' compensation for the last 49 years. The inclusion of a jury trial and the need to establish carrier negligence is at the heart of what is wrong with FELA. The need to establish carrier negligence distorts the focus from the real cause of the injury, significantly increases the cost to all parties, and presents the very real prospect that the injured employee may receive no compensation at all either because the employee cannot establish employer negligence or because the jury finds the employee contributorily negligent. Recent statistics, cited in my testimony, suggest that 22% of the most seriously injured receive no compensation whatsoever under this system. In addition, jury verdicts and awards can vary widely resulting in sizable differences between the amount of compensation received by injured employees with similar or identical injuries. The rights of injured workers would be protected far better through the swift and sure provision of compensation within the confines of the State workers' compensation systems.

There are also significant benefits that flow to employers who operate under no-fault compensation systems. With fault eliminated as an issue, compensation and rehabilitation can be provided to the injured employee almost immediately. In many instances, this results in a more rapid and successful rehabilitation and the return to the work place of an experienced employee. Second, elimination of fault as a factor in injury compensation allows both the employer and the employees to focus completely on the real cause of the injury and enables both parties to move expeditiously to eliminate the problem. Elimination of fault as a consideration also significantly reduces the administrative costs of the employee compensation system, costs which clearly benefit neither the employer nor the employee. Most of the reduction in administrative costs would come from attorneys' fees. Employers would save a considerable amount, but employees (who generally retain counsel on a contingent fee basis) will gain much more through keeping much more of the amounts awarded to them. Finally, for the railroad industry, the elimination of FELA and its replacement with a no-fault system would significantly improve the railroad's competitive position as they would then be covered by the same employee compensation system as their competitors in the trucking and airline industries.

QUESTIONS OF SENATOR KASTEN AND THE ANSWERS THERETO

SENATOR KASTEN: Mr. Riley, you indicated in your testimony that the costs associated with FELA have increased almost 100% between 1979 and 1986, despite the fact that employment in the rail industry has declined 41% and injuries have decreased 66%. To what do you attribute this significant jump in costs?

ANSWER: FELA is a fault-based employee compensation system with dispute resolution lodged in the traditional tort system. As a result, FELA has been adversely affected by the same dramatic rise in jury awards that has plagued the rest of the tort system. Following directly from this trend is a parallel increase in negotiated settlements which are directly influenced by the jury trends. A second, and contributing factor, is the high and ever increasing administrative and transaction costs associated with FELA. The presence of the negligence factor increases costs on both sides. While costs have also risen in the workers' compensation systems, the rise has been nowhere near as dramatic.

SENATOR KASTEN: Mr. Riley, you dispute in your testimony the accusation that has been made by the Illinois Public Action Council (IPAC) that FELA plays a role in enhancing railroad safety. To what do you attribute the marked improvement in the safety of rail operations? What role has the Staggers Rail Act played in enhancing safety?

ANSWER: We at FRA believe that the dramatic safety improvements that have occurred in the railroad industry over the last eight years whereby the accident rate has been reduced by more than 61 percent and the employee injury rate has fallen 66 percent had nothing to do with employee compensation programs but resulted instead primarily from the cash flows created by the Staggers Act that have enabled the railroads to improve their physical plant, and an increasingly effective FRA safety enforcement program.

SENATOR KASTEN: What, if any, effect would a shift over to State workers' compensation statutes have on the safety of rail operations? Would it affect managements' decisionmaking in the safety area?

ANSWER: FELA does not promote public safety, and a shift to State workers' compensation systems would have no impact on the safety of rail operations. FELA is a compensation statute. It has nothing to do with public safety since it does not apply to passengers or the general public but applies only to employee injuries.

In terms of work place safety, simple logic suggests that a no-fault program is a much stronger safety incentive than fault-based systems such as FELA. Under FELA the employer is responsible for the negligence only of its own officers and agents. It has no liability for employee injuries caused by the employee's negligence or misjudgment. Under State workers' compensation systems, the employer is absolutely liable for any injury, regardless of cause. This system provides a stronger incentive for employers to train and supervise all employees. To the extent the compensation system has any impact on safety of rail operations, we believe the state workers' compensation systems would be more beneficial than FELA. This is reflected most dramatically by the fact that all but one of the 120 major industrial groupings

in this country are covered by no-fault compensation programs. These industries certainly do not see no-fault workers' compensation as an impediment to work place safety. We believe a change to state workers' compensation would assist management decision making in that it would facilitate the identification of the causes of employee injuries, which is now often obscured by efforts to assign fault to one side or the other. I do not believe a change would affect how employers approach fundamental safety issues.

SENATOR KASTEN: Could you comment on the allegations made by both the Illinois Public Action Council and Railway Labor Executives' Association (RLEA) reports that the regulations and statutes in the rail safety area and their enforcement are inadequate to provide sufficient incentive to the railroads to maintain safe operations?

ANSWER: The declining accident numbers of the past four years conclusively refute that allegation. The FRA has vigorously enforced the rail safety regulations and statutes, and we believe this effort has played a central role in the dramatic improvement in the accident rates and the employee injury rates that have occurred in this decade.

SENATOR KASTEN: What is the present level of FRA's inspection force?

ANSWER: The FRA inspection force is currently at its statutory maximum of 325, with a few vacancies being filled at any given time.

SENATOR KASTEN: What level of fines have been assessed against the carriers for safety violations?

ANSWER: In 1987, FRA assessed civil penalties in the amount of $7,726,500. In 1986, FRA assessed $5,731,150.

SENATOR KASTEN: Have the system wide assessments of individual carriers been an effective enforcement tool?

ANSWER: FRA believes that the system wide assessments are a very effective enforcement tool working in tandem with our routine random inspection program. Since system assessments are an intense analysis of a railroad's safety performance conducted over a comparatively short period of time, we can appraise all aspects of the operations of the railroad. This facilitates dealing with structural issues such as corporate communications and accountability. Such issues are not easily addressed through the routine daily inspections.

SENATOR KASTEN: The IPAC report criticizes FRA's safety statistics, alleging that they are inaccurate and understated due to the failure of carriers to report accidents or incidents. Could you comment on this allegation?

ANSWER: Note that IPAC simply leveled general charges. It offered no evidence supporting those charges, and was unable to cite any instances of undiscovered underreporting. The accident and injury statistics are accurate and truly reflect the safety picture in the railroad industry. This is confirmed on a continuing basis by regular record checks conducted by our operating practices inspectors and the three or four system assessments we conduct each year. In addition, FRA has initiated a program to conduct special accident/incident record audits to assure that accurate reporting is maintained.

Senator EXON. We will now go to the next panel, Mr. Graham Claytor, Jr., President of the Board of Amtrak, and Mr. William H. Dempsey, President of the Association of American Railroads. Gentlemen, will you come forward please.

And Mr. Claytor, thank you for being here. Mr. Dempsey, I am pleased to welcome you again before the Committee. We will proceed now with Mr. Claytor.

STATEMENT OF W. GRAHAM CLAYTOR, JR., PRESIDENT AND CHAIRMAN OF THE BOARD, NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)

Mr. CLAYTOR. Thank you, Mr. Chairman. At the outset I want to thank this subcommittee for holding this hearing on Amtrak's proposal.

I had planned to describe it in detail, but Senator Kasten has done this so accurately and so well that I will stand on his description of my proposal and save time.

I also agree with most of the things that Mr. Riley has said and am not going to take the Committee's time by repeating any of the same arguments.

I do want to emphasize that we are not now asking for a permanent change in the FELA system. What we are asking for is an opportunity for a very short period to run a test.

Now, we have heard from Mr. Curtin of the GAO that they had done, I think, quite a creditable job of sampling and using all available techniques to compare two systems. What we would like to do is to have an actual three-year trial of the workers compensation system.

We will then have not samples but actual cases for the full period which we can compare with what we have just done under FELA for the previous three years. I think this will provide facts for Congress to use in deciding between the two systems.

And our proposal is not an effort to get under the tent and then maintain the status quo, because I have specifically proposed that at the end of three years, unless Congress affirmatively extends the time of the test or affirmatively adopts the new system, we will revert to FELA. So this is a true test, which it seems to me it is high time that we should have.

Now, Mr. Chairman, I am confident, of course, that if the test is made and evaluated, and we plan to ask GAO to evaluate the results on actual experience this time again, I am satisfied that Congress will in fact decide that workers' compensation is a better system.

The fairness to employees, some of whom get nothing under the FELA system that Mr. Riley referred to, is of course important.

Increased costs are also important, since these costs with Amtrak particularly are not paid by the company but are paid, like all costs at the margin; by the Federal government, and so these are costs that we should be able to save the Federal government.

I think it could come to $16 million to $20 million a year, as we go down the road, because with inflation the FELA costs are increasing every year at a much faster rate than any others.

However, there is a point that I want to make that has not been made. From my standpoint the most compelling reason for favoring the adoption of workers' compensation is safety.

FELA does not promote safety, in my opinion, but safety is involved. I think that the existence of FELA makes implementation of sensible safety programs very difficult and harms efforts to improve safety in the railroad industry.

Amtrak emphasizes the safety of its employees, and it is my personal number one objective. We have not done very well. We were among the poorer railroads a few years ago in employee safety.

My old railroad, Southern Railway, was at the bottom of the list in the 1960s, and we made safety a priority for everybody on the railroad, not just the management but everybody.

In about seven years we got the Harriman Gold Medal, and have won it four times since. I am determined that Amtrak is going to win the Harriman Gold Medal. We are now, this year, in the middle of the railroad industry in employee safety.

We have for the first five months of this year about 6.4 injuries per 200,000 man-hours. Last year the industry average was 6.7. So we are coming up. We are going to get there.

Now, how do you do that? You have got to have everybody concerned. It is no good having the top management say that safety is first, and stopping there. There is no use having a few good foremen who try to handle safety right at the workplace. There is no use having an occasional safety committee of the employees who try hard but they are all by themselves.

The whole thing has to be put together, and as I have always said, it has got to go from the board room to the brakeman, and any breakdown makes it ineffective.

Now, it is extremely hard to get safety all the way down when an injury occurs, regardless of how it occurs, if immediately that injury, if it is at all serious, is a subject of litigation.

Whose fault was it? No manager is going to admit that it is his fault. No workman is going to admit that it is his fault, because that determines the outcome of the litigation.

So you have a head-to-head confrontation, right at the start. That continues for two or three years, if it is an important case, that goes right through litigation. That is destructive of a joint safety system.

And in my opinion, the greatest contribution we can make to an effective employee safety system is to eliminate the confrontation that every injury generates between the injured person and management. And it inherently has to, because that determines the liability.

So, from my standpoint, safety is an issue here and it is the opposite of the arguments made that safety is helped by the FELA. I think the FELA system destroys an effective safety program or at least makes it much more difficult to implement.

Now, the idea that the high cost of injuries under FELA will result in greater safety, particularly by Amtrak, is simply ridiculous. The extra cost to Amtrak is cost to the Federal government.

All costs at the margin of Amtrak are at the expense of the Federal government. I can assure you that we at Amtrak are extremely interested in safety, and it will not make the slightest difference

to us in putting our safety program in effect whether our safety costs next year are high or low.

Cost is not a factor in safety. But ability to work with the people who are injured and the people at the bottom as well as the top of the hierarchy is important, and the FELA system makes that extremely difficult.

In my prepared testimony, Mr. Chairman, I have dealt with a lot of other things. But in the interests of time, I will stop right there. I would like to add one other thing, if I may, in conclusion.

My good friend, Fred Hardin, the President of the UTU, who has submitted prepared testimony, has suggested that there is a rumor throughout the industry that I am about to retire from my job at Amtrak.

I have been here for six years. In almost every year I have faced a rumor that I am about to retire. I have disregarded most of them because they eventually go away. This is the first time such a rumor has been put in the public record, so I have got to deal with it.

I want to make it very clear I am not about to retire this year, I am not about to retire next year, and I expect to be around for several years. I am interested in several things, three projects that I have started and I intend to see to finish.

The first one is the Washington Union Station, which we hope to open September 28th, but the Amtrak portion will not be finished for another year.

Second is the Atlantic City to Philadelphia new railroad. That is expected to start in the summer of 1989.

The third and most important is the West Side connection in New York. We are going to bring the trains from upstate New York into Penn Station instead of Grand Central for the first time. That project will tie Amtrak's system together in the Northeast for the first time. It will take effect in 1990.

I have not any intention of going away without finishing those things. And I just want to kill that rumor once and for all. Mr. Chairman, thank you very much.

[The statement follows:]

STATEMENT OF W. GRAHAM CLAYTOR, JR., PRESIDENT AND CHAIRMAN OF THE BOARD, AMTRAK

My name is W. Graham Claytor, Jr. I am President and Chairman of the Board of the National Railroad Passenger Corporation (Amtrak). I want to thank the Subcommittee for holding this hearing today to consider Amtrak's proposal to handle for a three-year test period the resolution of its employee injury claims under the no-fault state workers' compensation laws rather than under the existing tort-based Federal Employers' Liability Act (FELA) system. Amtrak's proposal further provides that after the second year of the test, the General Accounting Office (GAO) would be requested to report to Congress on the results of the test. Finally, at the end of the third year, the test would end and the FELA system would be reinstated on Amtrak *unless* Congress affirmatively legislates to the contrary.

My testimony today—and Amtrak's proposal—is not intended merely as an indictment of the FELA system. Rather, I believe Amtrak has an obligation to Congress, the American taxpayer, its employees and rail passengers to seek enactment of responsible and reasonable ways both to enhance safety in the work place and to reduce the cost of providing rail passenger service. Enhancing work-place safety for Amtrak's 23,000 employees means better morale, better employee relations, better productivity and better service; reducing Amtrak's costs reduces our dependence on federal financial support and promotes the long-term viability of national rail pas-

senger service. Amtrak's proposal, as I hope to demonstrate, serves both of these important objectives.

My testimony will focus on Amtrak's experience under FELA and what we would hope to achieve through a three-year test of the workers' compensation system.

INTRODUCTION

On March 24, 1988, I appeared before this Subcommittee during its consideration of a bill to reauthorize federal financial support for Amtrak. As the Subcommittee is aware, Amtrak has made dramatic inroads in reducing its dependence on federal financial support and anticipates covering over 67 percent of its costs with revenues during the present fiscal year. Nonetheless, despite record earnings this year that are expected to exceed $1.1 billion, Amtrak recognizes that it will continue to require federal financial support for the foreseeable future. We must, therefore, continue to seek ways further to reduce our costs in order to minimize the amount of such support that is needed to fund our operations.

In Amtrak's 1988 Legislative Program, submitted to Congress on February 16, 1988, Amtrak urged enactment of a package of legislative proposals that, once fully implemented, could generate over $80 million in annual savings. These changes—substituting a private pension program and social security for the existing Railroad Retirement program; substituting state unemployment benefits programs for the Railroad Unemployment Insurance system; eliminating punitive damage awards against Amtrak; and substituting state workers' compensation programs for FELA—would eliminate costs that have nothing to do with the provision of rail passenger service and would not in any way adversely impact the quality of Amtrak service. In order to achieve further significant cost savings in Amtrak's budget, we must look to such legislative proposals as the most viable options short of a discontinuance of service. Indeed, even the Administration's Privatization Commission, which filed its final report earlier this year, concluded that a multi-year reform program including Amtrak's proposals is needed before Amtrak will be attractive to private sector operation.

Amtrak believes that its proposal to conduct a test of the resolution of its employee injury claims under workers' compensation deserves strong consideration from this Committee. I am well aware that railroads generally favor a permanent change along the lines proposed by Amtrak for the whole railroad industry, while many trial attorneys and some rail labor leaders strongly oppose such a proposal, arguing that FELA is needed to promote safety and that workers' compensation will not adequately compensate injured rail workers for injuries. While I tend to agree with the industry position on this issue, based on my service for almost 25 years in the railroad business and as chief executive officer of two major railroads, I nonetheless am not asking that a final decision on this difficult question be made at this time. Whenever feasible, the fairest and most effective way to settle a hotly disputed issue like this is by actual trial. We believe that Amtrak, whose employees constitute only 12.5 percent of total railroad industry employment and whose operating losses must be borne by federal taxpayers, provides an ideal vehicle for such a test. Amtrak's test proposal would provide the empirical data—the facts—on which to base any decision concerning the future of FELA. Congress needs these data, and I feel they will show a significant cost savings for Amtrak, fair and reasonable compensation for injured employees, greatly reduced Amtrak subsidization of the FELA attorneys' bar, and an enhanced commitment to safety by labor and management. Of critical importance is that Congress will then have the actual facts, together with a GAO evaluation of those facts, on which to make an informed and sound final decision on this issue.

AMTRAK'S EXPERIENCE UNDER FELA

My foremost concern at Amtrak is the safety of our employees and passengers. We have made great strides towards institutionalizing safety awareness and injury prevention in the work force and towards creating and environment that promotes an injury-free work place. Such an environment, however, requires enormous commitment and cooperation at all levels of the corporation—from the Board Room to the brakeman. But, no matter how hard we strive to improve safety, and even with those in management and labor who are jointly committed to enhancing work-place safety, our efforts are continually undermined by a system that relies on the determination of fault—often in a bitterly fought court room battle—as the basis for employee injury compensation.

FELA was enacted in 1908 before the workers' compensation system became the standard means of compensating employees for on-the-job injuries. Workers' com-

pensation today is a no-fault system, in effect in every state, that covers nearly every other industrial employee in this country and provides immediate benefits and rehabilitation to all injured employees regardless of fault. In contrast, FELA is a tort-based system that requires lengthly and often bitter litigation to determine who was a fault for the employee's injury. Under FELA, if the employee was responsible for the injury, he or she cannot recover any compensation for the injury, no matter how severe. On the other hand, because juries decide this issue of fault as well as the amount of compensation, excessive jury awards inevitably occur from time to time. As Exhibit 1, attached hereto, demonstrates, there are numerous instances at Amtrak where one employee may recover nothing for an injury while another employee may recover a windfall for the same type of injury. One Amtrak employee claiming a hearing loss due to long-term exposure to noisy track machinery was denied any recovery, while an Amtrak employee claiming hearing impairment resulting from the blowing of diesel horn by a maliciously-motivated fellow employee was awarded $604,000. One Amtrak employee rendered permanently disabled by an on-the-job injury was denied any recovery, while another Amtrak employee claiming permanent disability from a neck injury recieved $400,000, only to recover miraculously from his disability and seek reemployment at his previous position just three months after trial. Unfortunately, from a cost perspective, it takes only one excessive jury award to compel companies to agree to settle cases that may be dubious merit or for amounts higher than should otherwise be dictated.

My experience in the railroad industry, and mere common sense, leads me to believe that safety in the work place and compensation of injured employees are too important and too critical to our quality of life and to our performance to be based on a lottery-like system that necessarily pits management—the company—against its own employees. This type of system for compensating employees is an anomaly in today's society where timely, dignified and certain compensation for on-the-job injuries under workers' compensation is the employee's right and the employer's obligation. The issue of fault has no place whatsoever in the cooperative battle we are trying to wage to eliminate work-place injuries—it acts to obscure accident prevention by creating conflicts of loyalty. It transforms efforts to learn from past errors into a game of hide-and-seek. Ideally, a work-place injury should set in motion a process by which Amtrak—management and labor—openly and honestly analyze the cause of an accident and develop a coherent strategy for preventing any similar occurrence in the future. Under FELA, an accident merely starts the ball rolling around the roulette wheel.

As far as I am concerned, no accidents are unavoidable and any employee injury rate greater than zero is too high. Amtrak's employee injury rate, while considerably lower than many other industries and some other railroads, is higher than it otherwise will be when we get the open and honest cooperation and commitment of every corporate employee—management and labor—to rooting out the cause of accidents and taking the necessary steps to prevent them from recurring. Nothing should stand in the way of that process.

Another issue that worries me greatly as the President of a corporation fighting to use every dollar as efficiently as possible is the rising cost of FELA compensation and its seeming inability to foster an environment conducive to a cooperative safety program. As shown in Exhibit 2, attached hereto, in 1982, total FELA costs, including legal expenses, medical payments and administrative costs, totaled $17.4 million. By 1987, despite little change in the number of FELA claims filed against the corporation, total FELA costs had almost doubled. FELA is costing Amtrak over $93,000 per day in claims and expenses. I possibly could justify this cost if I believed the mechanisms were in place to decrease the number of claims each year and to promote work-place safety. But the very system that is increasing the costs for which I must annually ask Congress to reimburse us is interfering with the efforts we are taking to reduce those claims.

An example of just what I man can be seen in Amtrak's Employee Safety Committees and Amtrak's Accident Prevention Committees. In an effort to institutionalize a program for reducing work-place injuries, each Amtrak facility or location with ten or more employees has an Employee Safety Committee composed of at least one volunteer employee representative from each department and at least one Amtrak management member. The Committee selects one member as Chairman, who conducts a formal meeting at least once a month. The Committee is responsible for the assessment of work areas to insure compliance with all safety regulations and to report any defects or violations of safety rules. The Committee is also charged with investigating accidents and injuries and contributing ideas for improvement of safety. Members discuss previous accidents, injuries and illnesses, defects and violations, and means and methods to prevent future occurrences.

In addition, Amtrak requires that every job-related accident, injury or illness must be investigated as soon as possible after the accident occurs. The investigation is conducted by an ad hoc Investigation Committee composed of a management employee, the injured employee's supervisor, and one additional co-worker or safety officer. A report of the Committee's findings is submitted at the completion of the investigation, together with recommendations to prevent recurrences.

I am proud of the contributions these Committees have made to enhance workplace safety. Yet, institutionally these Committees cannot fully serve their purpose. A so-called public interest group recently called FELA "the Nation's most significant rail safety law," arguing that high FELA awards make the railroads improve safety. That notion, however, is obviously absurd: members of any committee investigating the cause of an accident simply cannot function with complete honesty or integrity when determination of the cause of the accident may well dictate whether or not an injured employee will receive any compensation benefits for injury, and if so how much. A management member of such a committee, looking out for the department's or the company's budget, may be inclined to place the blame for the accident on employee error, while a labor member of the Committee, realizing that attributing fault to the employee may result in no compensation whatsoever for the injured employee, may be just as inclined to fault the corporation. As a result, the critically important task of learning from past accidents to prevent future ones is inherently undermined and necessarily deficient. I believe that any system that encourages this result is bad public policy.

FELA also undermines an extremely important new safety program recently initiated by Amtrak—the Safety Training and Observation Program, which we call the STOP program. Designed by the E.I. Dupont Company, it differs from the traditional railroad approach to employee safety by eliminating the punitive and adversarial aspects of disciplining employees for safety rules violations. Instead, the STOP program focuses on preventive safety through observation and immediate correction of safety rule violations and unsafe acts. Under the program, employees are not charged with or punished for violating safety rules—indeed, no names are taken of the employees involved; rather the employees are counseled as to their mistakes through group discussions and hands-on training. The STOP program depends on the strong involvement of management in the identification of acts that may be unsafe and a willingness by employees to acknowledge unsafe practices and to adopt safe ones. Unfortunately, the STOP program was not designed to operate in an atmosphere of mutural distrust where the issue of fault is determinative of employee injury compensation—it was designed by a company whose employees are covered by no-fault workers' compensation. The need to determine fault under FELA when there is an injury claim is entirely contrary to the STOP concept and is a major impediment to creating the environment where safety, not liability, is paramount.

GAO'S REPORT ON AMTRAK'S FELA EXPERIENCE

As the Subcommittee is well aware, the General Accounting Office (GAO) completed a report comparing Amtrak's employee injury compensation experience under FELA with likely workers' compensation awards in two states: Connecticut, which provides very high injury compensation benefits; and Indiana, a state with lower benefits (which, effective July 1, 1988, have been raised as much as 35 percent). GAO analyzed employee injury claims resolved in 1984, categorizing the injuries both as to type and duration, and then calculated benefit levels under applicable state statutory payment schedules. I submit a copy of the GAO report to the Subcommittee.

GAO estimated that Amtrak's payout for injury compensation under Connecticut's workers' compensation law would have been $2.7 million less than Amtrak's actual FELA payout of $23.9 million, a savings of 11 percent. GAO estimated that injury compensation under Indiana's law would have been $17.4 million less than Amtrak's actual FELA payout, a savings of 73 percent. Applying these percentage savings to Amtrak's anticipated FY 1989 payout of $38 million, Amtrak's cost for employee injury compensation would be reduced by between $4 million and $28 million dollars.

The GAO also found that Amtrak's injured employees hired attorneys to represent them in 41 percent of all cases and that these cases accounted for 88 percent ($21.7 million) of all the dollars paid out in FELA awards. Accepting GAO's conservative estimate that attorneys collected between 25 percent and 33 percent of any award or settlement check to the plaintiff, then of the $23.9 million paid out by Amtrak in 1984, between $5.4 million and $7.1 million actually was paid directly to attorneys. Moreover, litigation expenses—such as deposition, court, travel, witness,

and medical expert costs—are also deducted straight off the top of any award or settlement. The likely result is that only between 55 percent and 70 percent of Amtrak's payments is FELA cases actually goes to the injured employees.

These results raise several important questions that must be addressed. First, is the savings that Amtrak would realize under workers' compensation coming out of the employee's ultimate compensation; i.e., is Amtrak saving money at the expense of its employees? For the most part, I believe the answer is clearly no.

GAO's report supports Amtrak's own data that the primary "loser" if Amtrak were to switch to worker's compensation would be the FELA trial attorneys. GAO calculated that plaintiffs are represented by counsel in 41 percent of the FELA claims against Amtrak in which there was any payout at all. However, this percent is far greater in cases where there is a significant settlement or verdict. As detailed in Exhibit 3, during the past five years, Amtrak has paid FELA settlements or verdicts of $100,000 or more in 271 cases, for a total of $60.9 million. Of those cases, 248 or 91.5 percent were handled by plaintiffs' attorneys with total payment in those cases of $57.9 million or some 93 percent of total FELA payout in cases exceeding $100,000 and some 49 percent of all payouts under FELA. Our experience has shown that plaintiffs' attorneys generally collect between 25 percent and 33 percent of any settlement and between 33 percent and 40 percent (and as high as 50 percent) of any verdict reached after trial. We estimate that between $14 million and $23 million, and perhaps more, has been paid to plaintiffs' attorneys during the past five years in these 248 cases alone.

Even under GAO's more conservative assumptions, attorneys are recovering a sizable chunk of Amtrak's FELA payouts and much of this would dissapear under workers' compensation. While claimants who appeal workers' compensation commission decisions may hire counsel, most workers' compensation cases proceed without representation and in some states fees charged by counsel are strictly limited.

Thus, while there may be a seemingly large discrepancy between total FELA payouts and total workers' compensation awards, the amount actually going to the injured employee is far more equivalent and, as recognized by GAO, may in some cases be even higher under some state workers' compensation laws. What would be avoided under workers' compensation is the cruel disparity between the injured employee found to have been at fault who recovers nothing for his injury and the employee who recovers a windfall for his or her injury.

While a comparison of specific recoveries under FELA and workers' compensation is difficult, a rough analysis may nonetheless be useful here. I submit to the Committee a copy of the 1988 Analysis of Workers' Compensation Laws, compiled by the U.S. Chamber of Commerce. It provides detailed data on the benefits provided under each state workers' compensation law and should be useful to the Subcommittee in its consideration of Amtrak's proposal. The discussion below is based solely on data from the Chamber of Commerce compilation.

An Amtrak employee aged 35 with no dependents earning $29,000 in yearly wages injures his back and is permanently disabled. Every state workers' compensation law provides benefits equivalent to two-thirds of weekly wages for the duration of the disability, with maximum benefit ceilings. Two-thirds of the Amtrak worker's weekly salary amounts to $371 per week or $19,310 per year. In Connecticut, where the ceiling on weekly benefits exceeds $371, the employee could receive over the next 35 years (assuming he lives until age 70) up to $675,850 in benefits, *plus* cost of living allowances, and all medical and rehabilitation costs. Connecticut also provides allowances for each dependent.

Using present value calculations, we estimate that to approximate this amount of benefits in an FELA case that included $15,000 in litigation costs and a contingency fee arrangement with plaintiff's attorney of 33 percent of the verdict or settlement, the plaintiff would have to settle or win a verdict in the amount of $354,680. In Indiana, which places a ceiling of $190 per week, and $95,000 in total benefits (raised to $250 per week and 128,000 total effective July 1, 1988), plaintiff would have to settle or win an FELA verdict in the amount of $114,360 in order to receive equivalent benefits.

In Amtrak cases involving FEL claims alleging disability resulting from injuries, typical settlements have ranged from $200,000 to $350,000, with *actual* compensation to the injured employee after attorneys' fees (33 percent) and expenses ($15,000) of only $108,000 to $208,000.

This type of analysis demonstates that employees fears of substantially less compensation under worker's compensation laws than under FELA are unwarranted. Moreover, a key benefit of workers' compensation is that compensation is guaranteed whether or not the employee was at fault and benefits are paid out over time, thereby ensuring the future availablity of benefits. This analysis, however, also

raises the question of whether it is fair that an injured employee in one state may receive more compensation than an employee in another state suffering the identical injury.

This concern, too, is misplaced. By far, the most inequitable system is one that provides a windfall to some employees and *nothing* to another. FELA is just such a system. The family of an Amtrak employee run-over and killed by a train was denied any recover because the employee should not have been on the right-of-way, while an employee who suffered amputation of both hands, but was guaranteed a lifetime job with Amtrak with no out-of-pocket expenses, was awarded $5.3 million by a jury. In both cases, there should have been a right to fair and reasonable compensation; neither extreme, however, has any place in the modern work place and is avoided by the workers' compensation system.

Moreover, the legislatures of each state have determined what is appropriate compensation for on-the-job injuries occurring within their state. While numerous extreme comparisons between high and low benefit states can be made, nonetheless the benefit levels were not arbitrarily fixed but established by elected officials of each state as appropriate for injury compensation for nearly every other industrial employee. To claim that workers' compensation is unfair to employees of corporations with multi-state operations is to argue that the system should not apply to millions of American workers in thousands of corporations. Such an argument also translates into an indictment of state legislatures for unfairly compensating their own citizens. This simply is not justified.

AN AMTRAK TEST

Amtrak strongly believes that it can improve its safety environment and its system of injury compensation and at the same time reduce its need for federal funds through its three-year test of workers' compensation. If a test were approved, Amtrak would immediately establish an in-house task force to work with state workers' compensation commissions to ensure a smooth transition from FELA and to work with GAO to ensure that data could accurately be collected. We would focus on three types of comparative data: actual benefits received by injured employees; the cost to Amtrak for compensating employees, administering the program and defending appeals; and the impact of the injury compensation system on work-place safety.

Under Amtrak's proposed amendment, which is drafted as a new Title XI to the Rail Passenger Service Act and is attached hereto as Exhibit 4, state workers' compensation should be the exclusive rememdy for work-related injuries of Amtrak employees. Claims filed after the effective date of the commencement of the three-year test would be filed under the workers' compensation statute of the state in which the employee reports to work. Based on the opinion of legal counsel, Congress can constitutionally require each state to afford Amtrak workers access to the state workers' compensation system, and Amtrak has request each state workers' compensation commission to provide its views on the mechanics of Amtrak's test under its law. The responses of each state commission will be shared with the Subcommittee when we receive them.

I want to emphasize that Amtrak would work closely with this Subcommittee and all other parties involved, including labor, to ensure that the data collected can help provide Congress with the information it needs for further consideration of the FELA issue.

At the end of the three-year test, Amtrak's employees would again be compensated under the traditional railroad FELA system unless Congress by further legislation provides to the contrary.

THE SAFETY OF RAIL PASSENGER TRAVEL

Before concluding, I must address an issue recently raised by Citizen Action, which claims to be a public interest organization. Citizen Action, which has come out against any repeal of FELA and claims that FELA is the nation's "most effective" rail safety bill, attempts to portray rail passenger travel as an inherently unsafe, dangerous mode of transportation. The statistics cited by the group, however, are incredibly misleading and support neither the retention of FELA nor the contention that rail passenger travel is inherently dangerous. I simply cannot permit a statement of this kind by a so-called public interest organization to go without a response.

Citizen Action states in a "Briefing Paper: Railroads A Growing Public Danger in Wisconsin" that railroads "kill hundreds of people every year across the country," citing 1165 "total rail fatalities" during 1987 and noting that only 357 commercial

airline deaths occurred during the same time. To mix railroad passenger or employee deaths, however, with fatalities stemming from rail crossing automobile accidents and suicides or other accidents, as Citizen Action does, is not only to mix apples with oranges but to perpetrate a great injustice to the traveling public and to the employees of the railroads.

From the passenger safety perspective, rail and air travel are so safe as to make statistics rather meaningless. Between 1977 and 1987, Amtrak operated some 46.3 billion passenger miles with 27 passenger fatalities, 15 of which occurred in a single accident. For the same ten-year period, commercial airlines operated some 2,421.7 billion passenger miles with 1,419 fatalities. Statistically, Amtrak's and the airlines' fatality rates were identical—5.8 death per ten billion passenger miles—and, from a safety perspective, essentially negligible.

Moreover, to use passenger, rail crossing, suicide and other accident fatalities in support of FELA, which covers *only* railroad employees, is equally misleading, to say the least. FELA is irrelevant to claims by any of these other groups.

I strongly believe, without a doubt, that the most effective rail safety law that could possibly be enacted would require the random drug testing of all railroad employees in safety-sensitive functions. The drug and alcohol problem has reached epidemic proportions and the consequences for safety, as so tragically demonstrated in the Chase, Maryland accident, are enormous. I am curious why Citizen Action, as a public interest group, is not advocating this solution for what nearly everyone now recognizes is the most important issue facing rail and other public transportation safety.

CONCLUSION

Amtrak is dedicated to two fundamental goals: enhancing safety in the work place and reducing its dependence on federal financial support. Strong arguments have been made that workers' compensation is cheaper, more equitable, and better able to foster a work place environment conducive to safety than the existing FELA system. I personally believe this to be the case, but all we suggest at this time is an actual test of this proposition for a limited period. Because Amtrak is scrutinized in detail by Congress and subject to oversight with regard to all our operations, we are ideally suited to test a workers' compensation approach to employee injury compensation. Such a test would provide the empirical data Congress needs to make an informed decision on the future of FELA. I would urge this Committee to give us the opportunity to conduct such a test and I look forward to working with the Committee on this issue.

EXHIBIT 1.—ILLUSTRATIVE DECISIONS DEMONSTRATING INEQUALITIES IN AMTRAK FELA CASES

1. EXCESSIVE AWARDS

R38147—$5,350,000 jury verdict in favor of employee who suffered amputation of both hands, but who had guaranteed lifetime job with Amtrak and no out-of-pocket expenses.

R22923—$604,000 jury verdict in favor of employee who claimed hearing impairment and ear problems resulting from sounding of nearby diesel horn by maliciously motivated fellow employee.

R28639—$650,000 jury verdict in favor of Amtrak patrolman who twisted ankle while descending stairs, requiring subsequent tendon repair, but who recovered with minimal residuals and who had been guaranteed permanent light duty "desk job" with Amtrak police.

R26367—$175,000 jury verdict in favor of employee who received minor burns to hand and right thigh, with complete healing of hand and only two small scars on thigh.

R16209—$306,000 jury verdict in favor of employee who suffered broken nose in fight with co-worker, claiming subsequent aggravation of sinus condition and allergies. Verdict set aside because of excessiveness; subsequently settled at $55,000.

R17406—$400,000 jury verdict in favor of employee who claimed permanent disability due to neck injury, but who then claimed recovery and attempted to return to former job within three months following trial.

R38098—$300,000 jury verdict in favor of employee who claimed permanent disability due to "hysterical paralysis" of right leg following electric shock from defective light switch, but who subsequently claimed recovery and attempted to return to regular job.

Y02043—$233,000 jury verdict in favor of employee who claimed permanent disability due to extreme psychotic reaction resulting from "near miss" by train, but who subsequently attempted to return to former employment approximately 18 months later, claiming recovery.

R37668—$32,000 jury verdict, seven years post accident, in favor of employee who suffered badly bruised hand but who missed only 25 days work and had worked steadily during all the ensuing years.

R02204—$148,000 jury verdict in favor of employee who sprained back while lifting box, which allegedly caused ensuing severe mental problems.

R19451—$45,000 jury verdict in favor of man who claimed that fungus infection on feet and lower body was caused by allergy to creosote on railroad ties, in spite of overwhelming medical evidence to the contrary.

RA0229—$48,253 jury verdict in favor of employee who suffered broken nose when struck by flying spike during track laying and missed 45 days work. Nose healed normally, with no cosmetic defects.

2. ZERO AWARDS

R34437—Defense verdict in lawsuit brought by widow of trackman who died of heart attack while performing manual labor.

R17058—Defense verdict in lawsuit brought by widow of track inspector killed by train.

R16565—Defense verdict in lawsuit brought by employee who had permanently disabling back problems allegedly due to on-the-job injury.

R20057—Defense verdict in case brought by widow of employee who suffered on-the-job fatal heart attack.

Y02040—Defense verdict in lawsuit brought by employee who suffered severe on-duty back injury which rendered him permanently disabled.

R30577—Defense verdict in lawsuit brought by employee who claimed hearing loss due to long-term exposure to noisy track machinery.

R27677—Defense verdict in lawsuit brought by employee who allegedly sustained permanent disabling back injury due to slip on icy steps of work train.

EXHIBIT 2.—FELA PAYMENTS MADE BY CALENDAR YEAR

Year	Average claim payment	No. of settled claims	Average lawsuit payment	No. of settled lawsuits	Total new claims and suits	Total payment [millions]	Defense legal expenses [millions]	Medical payments [millions]	Claims and litigation mgt. cost [millions]	Total cost [millions]
1982	$3,311	1,500	$29,451	269	3,268	$12.9	$1.3	$1.7	$1.5	$17.4
1983	3,717	1,180	44,261	266	3,403	16.2	1.9	2.5	1.5	22.1
1984	5,320	1,070	61,612	305	3,462	24.5	1.9	2.7	1.6	30.7
1985	6,087	1,228	74,205	237	3,403	25.1	1.6	3.3	1.8	31.8
1986	7,818	1,334	62,220	307	2,917	29.4	2.2	3.5	2.1	37.2
1987	6,382	1,291	60,748	285	2,975	25.6	3.1	3.1	2.2	34.0

EXHIBIT 3.—AMTRAK FELA SETTLEMENTS AND VERDICTS EXCEEDING $100,000

	Total number of cases	Cases with counsel for plaintiff	Total paid in all cases [millions]	Total paid in cases with counsel [millions]
Year:				
1983	27	27	$6.48	$6.48
1984	61	58	13.25	12.78
1985	53	45	13.90	12.56
1986	74	65	15.77	14.07
1987	56	53	11.49	10.97
Total	271	248	60.89	56.86

Note: Estimated plaintiffs' attorneys' fees: At 25 percent contingent fee: $14,200,000; at 40 percent contingent fee: $22,700,000; actual Amtrak defense attorney's fees: $3,100,000.

EXHIBIT 4.—THREE-YEAR FELA EXEMPTION

The Rail Passenger Service Act is amended by adding thereto the following new Title XI:

TITLE XI.—LIABILITY FOR INJURIES

Section 1101. *Definitions.* For purposes of this title only, the following terms shall have the meaning specified below:

(1) "Primary entitlement to benefits" means the combined entitlement of any employee of the Corporation to annuities or other benefits under a) the Railroad Retirement Act of 1974, 45 U.S.C. 331 *et seq.*, b) the Railroad Unemployment Insurance Act, 45 U.S.C. 351 *et seq.*, c) the Social Security Act, 42 U.S.C. 301 *et seq.*, d) any publicly funded benefits program, and e) any program of retirement, disability, or medical benefits paid for in whole or in part by the Corporation.

(2) "Principal place of employment" of an employee of the Corporation means the state in which the employee normally reported for duty at the time when the events occurred that caused or contributed to the injury or death that is the subject of a work-related claim. Notwithstanding the preceding sentence, if an injury or death giving rise to a work-related claim is caused by cumulative events or is determined to be an occupational disease, the principal place of employment with respect to such claim shall be the state in which the employee normally reported for duty at the time the claim was filed. It there is no single state where the employee normally reported for duty, the principal place of employment shall be the state in which the office of the employee's immediate supervisor was located.

(3) "Railroad" means any railroad, transportation authority or other entity with which the Corporation has contracted for provision of services or use of tracks and facilities, and includes the officers, agents, servants, subsidiaries, and employees of such organizations.

(4) "Work-related claim" means a claim against the Corporation or a railroad by or with respect to an employee of the Corporation for injury, death, or occupational disease arising out of and in the course of the employee's employment.

(5) "Workers' compensation law" means the legal standards and procedures established in a state for handling claims by or with respect to employees in general in that state for injuries or death arising out of and in the course of their employment, but shall not include legal standards or procedures limited to one or more specific industries, trades, or professions.

Section 1102. *Employee Injuries.*—(a) Notwithstanding any provision of law excluding railroad employees from coverage by a state's workers' compensation law or authorizing a railroad employee to bring a tort claim against a railroad, any work-related claim shall be governed by the workers' compensation law of the state in which the employee's principal place of employment is located. An employee shall be entitled to benefits under a workers' compensation law only to the extent that the amount of benefits under such law exceeds his or her primary entitlement to benefits.

(b) The provisions of the Federal Employers' Liability Act (45. U.S.C. 51 *et seq.*) shall not apply to work-related claims governed by this title, and the applicable state workers' compensation law shall be the exclusive remedy with regard to work-related claims by employees of the Corporation against the Corporation or a railroad.

(c) This title shall apply to (i) all work-related claims caused in whole or in part by activities that occurred in the course of the employment relationship during the period commencing with the date of enactment of this title and ending three years thereafter and (ii) all claims for occupational disease filed during that period.

(d) Notwithstanding any requirements contained in the workers' compensation law of any state, including requirements for bonding and licensing, the Corporation shall be deemed qualified to self-insure for workers' compensation coverage under the laws of all states, and no state shall deny workers' compensation benefits to an employee of the Corporation based upon a failure of the Corporation to comply with such qualification requirements.

(e) Notwithstanding Section 306(n) of this Act or any other provision of law to the contrary, the Corporation shall be subject to the workers' compensation taxes and assessments of a state in the same manner and to the same extent as any other self-insured entity doing business within the state that is governed by the workers' compensation law of that state.

QUESTIONS OF SENATOR EXON AND THE ANSWERS THERETO

Question: If safety is as you say it is -- a concern which must be stressed "from the board room to the brakeman," how does a workers' compensation system achieve this goal if through the process employees manifest their dislike for this reform.

Answer: As I have explained in my testimony at some length, I strongly believe that the use of workers' compensation to resolve employee injury claims will remove a major impediment -- the management-labor antagonism inherent in the FELA fault system -- to the joint effort necessary to improve work place safety.

The opposition of some rail labor organizations and employees to Amtrak's proposal stems, I believe, from concerns that workers' compensation provides inadequate benefits and from efforts by FELA attorneys to play on these concerns. In fact, the vast majority of workers in the United States are covered by workers' compensation and the benefits, which are established by the state legislatures, are reasonable and fair. The zero awards and the multi-million dollar awards under FELA are replaced with benefits determined to be constitute appropriate compensation by responsible and elected public officials. It is my belief that the more employees learn about workers' compensation, the more supportive they will be for the positive impact that system would provide in enhancing worker place safety. This is underscored, I believe, by the experience of the Alaska Railroad, which was placed by Congress under the workers' compensation program rather than under FELA in 1982. Testimony submitted for the record by F. G. Turpin, President of the Alaska Railroad Corporation, emphasizes the positive, cooperative approach management and labor take toward work place safety, as well as Mr. Turpin's belief that this cooperative approach is enhanced by resolution of work place injury claims under the no-fault workers' compensation system.

QUESTIONS OF SENATOR KASTEN AND THE ANSWERS THERETO

Question: Do States compensate workers for hearing loss incurred in employment?

Answer: Yes, all states provide benefits for occupational loss of hearing. A state-by-state summary of such benefits can be found on Chart VII page 22) of the 1988 Analysis of Workers' Compensation Laws. In addition, seventeen states and the District of Columbia have enacted specific compensation statutes dealing with occupational hearing loss.

Question: Allegations have been made by the Illinois Public Action Council that state workers' compensation statutes do not cover occupational diseases incurred by employees in the work place. Don't all states uniformly provide such coverage?

Answer: Yes, all state workers' compensation laws provide benefits for occupational diseases. A state-by-state summary of such benefits can be found on Chart IV (pages 10-14) of the 1988 Analysis of Workers' Compensation Laws, published by the U.S. Chamber of Commerce, a copy of which was provided to the Subcommittee for the record.

Question: As I read Amtrak's legislative proposal, appended as Exhibit 4 to your testimony, all claims for occupational diseases filed during the three year experimental period would be subject to the relevant State workers' compensation system. Occupational diseases of rail workers would therefore be expressly covered under the State systems. Is that correct?

Answer: That is correct. State workers' compensation systems would provide the exclusive remedy for occupational disease claims filed during the three years and would be treated similarly to occupational disease claims filed by all other covered workers in the various states.

Senator EXON. Mr. Claytor, thank you very much. And I for one am delighted to hear that you are not going to retire. I never did think that you were. It is not your nature.

Mr. CLAYTOR. Well, I should make clear that I serve at the pleasure of my board of directors, and they can fire me any time. And I leave that possibility there. But I am not going to retire voluntarily.

Senator EXON. Well, that would not be retirement there, would it?

Mr. CLAYTOR. No, no sir.

Senator EXON. I just hope that we can keep your announcement in this room today and in this record. I would hate to have that get out and President Reagan take up the same charge as you did. That would complicate things for many of us.

Certainly, Mr. Claytor and Mr. Dempsey, we want your full testimony as submitted to be included in the record, and without objection we will make that announcement at this time. My first question maybe would be to both of you, maybe one of you can answer it and the other would say amen.

In light of Amtrak's proposals, there has been some discussions about the need for some states, at least, to amend their workers' compensation laws in order for Amtrak workers to receive coverage.

Can either of you discuss that, confirm it or deny it? Or shed any light on that potential problem? And what would be the potential timeframe that might be involved, if changes are necessary?

Mr. CLAYTOR. Well, I do not think any changes are necessary, Mr. Chairman.

Our proposal, which is submitted as an amendment to the Rail Passenger Services Act, would provide specifically that all state workers' compensation acts would include Amtrak employees. That is perfectly Constitutional. There are a number of cases in which the FELA has been made applicable to state courts and state procedures.

In addition, our statute provides that the applicable state compensation act will be the state in which the employee reports for duty, and that in turn is defined in some detail.

So it would not be a case of, you happen to be injured in some state a long way from home and that is the state that covers your injury. Your injury will be covered by your state in which you report for duty. And our proposal is quite specific on that point.

I think that takes care of those problems. Our feeling would be that this could take effect on enactment, for three years following enactment. We would be ready to move immediately.

Senator EXON. Thank you very much.

I think it would be best if we heard from Mr. Dempsey at this time. The balance of the questions that I have could apply to either or both, so I will entertain your testimony at this time.

STATEMENT OF WILLIAM H. DEMPSEY, PRESIDENT, ASSOCIATION OF AMERICAN RAILROADS

Mr. DEMPSEY. Thank you, Mr. Chairman. I will be very brief.

I have little to add to what has already been said. I am here, of course, because of the interest of the industry in general, and I am here to express our strong support for the proposal that Amtrak be given this three-year period, and its employees, to try out this experiment.

One would have hoped that the decades of experience would have been enough, but it is an 80 year old system and there is anxiety and apprehension about change, and we appreciate that.

We are, with Mr. Claytor, confident of the outcome and therefore with enthusiasm we endorse the proposal that that experiment be made.

I may say, incidentally, that as one charged with the solvency of the retirement fund for the industry, I gratefully acknowledge what you have said, Graham, about your plans.

I think just one word that I would add—well, perhaps two. I certainly endorse everything that Mr. Claytor has said about the safety issue. To me, it is a false issue and indeed it cuts the other way, as Graham indicated, in my judgment.

There has been cast abroad the notion that perhaps a unique system is necessary for the rail industry because we are somehow uniquely unsafe. But as the data in my statement indicate, that is by no means the case. It is a heavy industry, but we do have unfortunately injuries and deaths in the industry.

But we rank well when compared with other heavy industries, and you have all heard many times the record of the safety improvements in the industry over the last decade or so.

And then to suggest, with all due respect, as I understood Senator Metzenbaum, that to undertake this experiment would expose the public to greater danger is to suggest, it seems to me at least, that 50 state legislatures are indifferent to their responsibilities to protect the public and the employees in their jurisdictions.

As one last point that has been made, but I would like to emphasize it, and that is that this is a system that is not only inimical to safety because of the points that have already been made about the distortions that on both sides, management and labor, are produced by trying to identify, sometimes to misidentify, the causes of accidents.

We have the problem of rehabilitation. It is illustrated. There is a cartoon that one of my children cut out of the paper and gave me not too long ago. It shows a courtroom and it shows the judge entering and the bailiff and the plaintiff's attorney and the plaintiff.

The plaintiff is swathed in bandages and he's sitting in his wheelchair. The bailiff says: All rise and give honor to the honorable court. The lawyer of course rises, and the plaintiff rises. And the lawyer says: Not you, stupid.

Well, that is obviously an exaggeration, but it is—rehabilitation is a real problem once you get into this adversarial system.

Mr. Chairman, that really is all that I think I need to say at this time.

[The statement and questions and answers follow:]

STATEMENT OF WILLIAM H. DEMPSEY, PRESIDENT, ASSOCIATION OF AMERICAN RAILROADS

My name is William H. Dempsey. I am President of the Association of American Railroads whose members include all of the major rail freight carriers in the United States and Amtrak. I am pleased to be before the Subcommittee to discuss the proposal under which, for a three-year experimental period, Amtrak would be transferred from coverage under the Federal Employers' Liability Act (FELA) to coverage under state workers' compensation systems. Earlier this year, in a letter to the Chairman and ranking minority member of the Commerce Committee, the AAR expressed its wholehearted support for this proposal. At this time I would like to reiterate our support for the proposal and the views put forth in that letter.

FELA is the method of compensating railroad employees who are injured on the job. It is a tort-based system which requires, as a prerequisite to receiving compensation, that an injured worker prove that his employer's negligence caused the injury. Under workers' compensation systems—which apply to virtually all other workers in the United States—workers who sustain job-related injuries are compensated without regard to fault. Without attempting to describe the workers' compensation systems in detail or to defend any individual state's system, I will only say that they represent the judgment of fifty state legislatures as to the appropriate method for compensating employees injured in the workplace. It is also the system employed for workers in the District of Columbia and by the federal government for longshore and harbor workers.

As you know, FELA covers not just Amtrak, but the entire railroad industry. I am not here today, however, to discuss the concerns of the railroad industry as a whole with the FELA. That issue can be, and hopefully will be, addressed at another time. The scope of this hearing is limited to the Amtrak proposal, and I believe that Amtrak has already made a strong case in its support.

I wish to focus my remarks on an issue which has been raised every time a change in the current FELA system is suggested: that being the issue of railroad safety and its relation to FELA. For example, a member of this Subcommittee has been accused of "leading the charge to undermine the nation's most effective rail safety law" and was severely criticized by a group called the Wisconsin Action Council for even suggesting that this hearing be held. An affiliated group, the Illinois Public Actions Council, has issued a report and several press releases in recent months which have touted FELA as an important safety statute and argued strenuously against any suggestions that it be replaced. The characterization of FELA as a safety statute and the suggestion that its replacement with the state workers' compensation system—either for Amtrak or on a broader scale—will in any way undermine railroad safety is ludicrous.

Unfortunately the charge which the Illinois Public Action Council report attempts to document has been widely disseminated with much attendant publicity and thus needs to be squarely addressed in the context of the proposal to shift Amtrak to state workers' compensation systems. Fortunately, when the evidence proffered by the Council is exposed to scrutiny it quickly becomes clear that the charge is without merit. I have attached to this testimony, as Appendix A, a detailed rebuttal of the Illinois Public Action Council's report—a report which it is to be noted was funded by America's trial lawyers.[1]

FELA's proponents assert that railroads pose a great danger to both the public and their employees and that FELA, and only FELA, serves to check this danger. Wisconsin Action Council and Illinois Public Action Council proclaim the need for FELA by pointing to statistics on the number of people killed in accidents involving railroads. The overwhelming majority of the fatalities included in the Illinois Public Action Council and Wisconsin Action Council reports do not involve railroad employees; rather, they result from railroad crossing accidents or other accidents involving members of the general public, often trespassers on railroad property. Few of the accidents involves FELA and in many of these cases the railroad involved is completely blameless. But regardless of the question of fault, the simple fact is that FELA has absolutely no relation to this "evidence" cited by its supporters, as only railroad employees can be compensated under FELA. Members of the general public who are injured or killed in an accident as a result of a railroad's negligence will have a remedy based on tort law, not FELA. If FELA were replaced with the state workers' compensation system, this would not change. In short, there is no relation

[1] A spokesman for Citizen Action, with which the Illinois Public Action Council is affiliated, admitted that a group of FELA attorneys paid most of the $50,000 cost of the Council's study of railroad safety. Rapid City Journal, June 15, 1988 at D7.

between FELA and most of the statistics cited by its proponents to support their safety arguments. Their so-called evidence is an obvious attempt to mislead and to obfuscate the issues surrounding FELA.

It may be suggested that the threat of FELA liability indirectly acts to protect members of the general public who are not covered by the statute. This argument is also without merit. There is little connection between accidents involving harm to the general public and those giving rise to FELA liability. For example, while the majority of the 1986 fatalities cited by the Wisconsin Action Council occurred in grade crossing accidents, that same year only 0.4 percent of employee injuries occurred at crossing accidents.[2] If indeed FELA were a safety incentive for the railroads, logic would dictate that little attention should be paid to crossing accidents since they result in minimal FELA liability. On the contrary, railroads spend considerable sums to minimize hazards at grade crossings, even though fault, if any, usually lies with the highway vehicle operator.[3] Whatever the merits of FELA as a compensation system for railroad employees, it is wholly irrelevant as a safety incentive for the benefit of the general public. To argue otherwise is, to put it kindly, disingenuous. In point of fact, apart from any humanitarian considerations, in terms of rendering quality service and keeping costs in check, railroads need no outside stimulus to operate safe systems. The costs of a major accident in terms of property loss alone are stimulus enough.

In their zeal to make a case for FELA, the law's supporters cite railroad and airline fatality statistics and claim that, on a per passenger-mile basis, a rail passenger is more likely to be killed than is a passenger on an airplane. In making their comparisons, FELA's supporters choose their time periods carefully, selecting years that were relatively good for airlines and bad for railroads. If a longer time period is examined, rail and air passenger fatality rates per 100 million passenger mile are more nearly equivalent. It seems silly, however, to quibble over these statistics, for what they really show is that both methods of travel are exceedingly safe and that the chance of a passenger being killed on either a plane or a train is infinitesimal.

Amtrak is a passenger carrier, and at first blush it may seem relevant to raise the issue of passenger safety. In truth, reference to passenger safety is nothing but a play to the public's emotions, as passengers cannot be compensated under FELA. Though FELA is wholly irrelevant to passenger safety, as a common carrier Amtrak owes a high standard of care to its passengers under state tort law. As a result, Amtrak would face heavy liability to any of its passengers who were killed or injured due to its negligence regardless of whether the switch to workers' compensation is made. Just as is the case with the freight railroads, Amtrak would simply go out of business if safety were not its first priority. Replacing FELA with workers' compensation would be neutral on the issue of passenger safety.

A final tactic used by FELA's supporters to press their argument is to suggest that rail shipment of hazardous materials poses a grave danger to the public. Here, FELA's supporters blatantly misrepresent the industry's record. For example, it is alleged that toxic rail accidents are an increasing danger to the public because the number of railroad accidents involving hazardous materials as a percent of total railroad accidents increased from 10.7 percent to 13.4 percent between 1982 and 1986. What they neglect to mention is that during that same period the total number of railroad accidents involving hazardous materials dropped from 494 to 364, a 26 percent decline. As in other areas, the railroad industry's safety record with respect to the transportation of hazardous materials is very good and improving. Attached, as Appendix B, is a paper directly addressing the question of railroad transportation of hazardous materials. It clearly shows that the facts are directly contrary to the allegations made by FELA's supporters.

Even more irresponsible than the distortion of statistics is the contention that FELA serves to protect the public from accidents involving hazardous materials. FELA is totally unrelated to the right of a member of the public to be compensated

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[2] On the other hand, the types of occurrences which result in the greatest number of railroad employee injuries, referred to by the Federal Railroad Administration as Non-Train Incidents, rarely have any impact on the general public. In 1986, 83.2 percent of all employee injuries, but only 14.1 percent of non-employee injuries occurred in Non-Train Incidents; 49.1 percent of employee fatalities, but only 2.6 percent of non-employee fatalities occurred in Non-Train Incidents. See, U.S. Dept. of Transp., Federal Railroad Administration Accident Incident Bulletin, Calendar Year 1986, June 1987, p. 24, Table 15.

[3] *See* Prevention of Rail-Highway Grade-Crossing Accidents Involving Railway Trains and Motor Vehicles, No. 33440, 322 I.C.C. 1 (1964). The Commission concluded "that the principal cause of grade crossing accidents is failure of motor carrier operators to stop or exercise due care and caution or to observe and comply with existing safety laws and regulations." 322 I.C.C. at 86.

for injuries sustained as a result of the release of hazardous materials. Replacing FELA with workers' compensation would not affect the public's right to seek compensation from the railroad or any other party responsible for their loss. Even if only monetary incentives are considered, it is obvious that the railroads have strong incentives to keep their operations safe and to prevent accidents involving hazardous materials. A serious accident involving hazardous materials would expose a railroad to heavy financial liability, as well as great expenses for clean up, loss of lading and damage to equipment. This financial exposure dwarfs any FELA liability that might result from the same accident. It is both illogical and scandalous to suggest that but for FELA railroads would have little regard for the safety of the communities through which they travel. One has to wonder about the motives behind a report which bases its sensational charges on patently misleading interpretations of statistics.

If FELA has any impact on workplace safety it is more likely to be negative than positive. Because a finding of fault is a prerequisite to a FELA recovery there is often an incentive for employees to color their account of workplace accidents. FELA is a comparative negligence statute, and therefore any admission of fault on the part of an employee could result in a reduction of his award. Operating in the workplace, a fault-based system only serves to impede investigations of accidents and make an objective assessment of workplace safety conditions more difficult.

FELA's proponents are faced with the fact that railroad workers are virtually alone in their coverage under a tort-based, as opposed to a no-fault, compensation system. They must somehow justify FELA in the wake of the more modern and long-standing public policy—now embraced by all the state legislatures as well as the federal government—that work-related injuries and illnesses are best dealt with under no-fault compensation systems. They attempt to do this by asserting that railroading is such a hazardous occupation that a special law is necessary. No substantiation is offered to support the allegation that railroading is ultra-hazardous. Perhaps FELA's supporters feel that if they say it often enough it will be believed. The facts, however, belie this assertion.

Railroading is a heavy industry, and on-the-job injuries do occur. However, when compared to other heavy industries railroading fares better than many in terms of injury rate. Data compiled by the Bureau of Labor Statistics reveal that in 1985 (the most recent year for which data are available) the incidence rate of occupational injuries and illnesses per 100 full-time workers in the railroad industry was 8.4. This was lower than in the areas of agriculture, forestry and fishing; construction; and the manufacturing of most durable goods and a number of non-durable goods. The incidence rate was also lower in the railroad industry than it was in other transportation industries, including local and interurban transit; trucking and warehousing; water transportation and air transportation, which experienced rates of 9.4, 13.9, 13.0 and 13.1 respectively.[4]

The railroad industry's safety record has shown marked improvement during this decade—an improvement made possible in part by the industry's improved financial condition resulting from the Staggers Act. Between 1980 and 1986 total employee injuries and lost time injuries both declined by approximately 59 percent. Although some attribute this solely to the decline in railroad employment experienced during this period, the decline in injuries far exceeded the decline in rail employment. The number of injuries per 200,000 manhours decreased from 10.81 to 6.89 between 1980 and 1986. The number of lost time injuries per 200,000 manhours decreased from 6.13 to 3.95 during this period. Furthermore, the total number of railroad accidents and incidents declined from 69,535 to 26,623 between 1980 and 1986, a drop of 62 percent.

The improvement in the railroad industry's safety record in recent years is strong evidence that a healthy competitive environment which allows railroads to earn a reasonable rate of return is the most effective means for maintaining safety. The availability of capital for investment in maintenance of track and equipment has a far more direct and positive impact on railroad safety than does the method of compensating injured employees. In fact, the industry is of the view that if anything, FELA, with its potential for creating antagonism between employees and their employers and its lottery-like system of recovery, detracts from railroad safety.

I would like to comment briefly on one aspect of FELA which runs directly counter to what should be an important goal of any compensation system: rehabilitation and a speedy return to work of injured employees. Reliance on litigation to

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[4] U.S. Dept. of Labor, Bureau of Labor Statistics: Occupational Injuries and Illnesses in the United States by Industry, 1985. May 1987.

resolve disputes and award compensation—as a fault-based sytem often must—is inherently antithetical to the goal of rehabilitating injured workers. Unfortunately, the cases involving more serious injuries—where rehabilitation is most likely to be necessary—tend to be the cases that go through a protracted litigation process.

Litigation strategy calls for presenting the most sympathetic case to a jury and building up "special" damages. This can create pressure on an employee to avoid, or at least delay, the most prudent and effective medical and rehabilitative treatment. Yet, to be most effective, the rehabilitation process should be implemented as early as possible. Though waiting out the litigation process may result in an employee hitting the jackpot, he may also come away with nothing. In either case, however, he may do irreparable harm to his chances of returning to productive employment.

The proposal before the committee today is modest indeed. It calls for only a three-year test period which will allow for a comparison between FELA and workers' compensation coverage in the railroad industry. I believe that the facts after the three-year test will conclusively bear out this testimony. And, the great potential for cost sharing justifies, at very least, the short experiment sought by Amtrak. Rather than singling out Amtrak employees, this proposal puts them on the same footing as the rest of America's workers. Only the remainder of the railroad industry continues to be singled out.

The Amtrak proposal will give Congress an opportunity to examine and assess the claims that FELA's supporters make. It will enable Congress to see for itself what impact FELA has on railroad safety. I believe it will find little cost and much benefit if Amtrak's proposal is adopted. I am confident of the railroad industry's views on this matter as expressed in my testimony today. There is, however, only one way to find out for sure. Therefore, I urge the committee to adopt Amtrak's proposal to replace FELA with the state's workers' compensation system for a period of three years.

QUESTIONS OF THE CHAIRMAN AND THE ANSWERS THERETO

Question 1. Mr. Dempsey, the claim has been made that FELA acts as a safety statute, ensuring that the railroads remain accountable and responsive to safety concerns. Consequently, it is argued that a repeal of FELA would have a detrimental impact on the safety of railroad operations.

Aren't there "built-in" incentives for the carriers to ensure safe operations—such as decreased liability, compliance with FRA safety requirements, and providing efficient service to shippers?

Answer 1. Most assuredly repeal of FELA would not have any detrimental impact on the safety of railroad operations. It is true that FELA burdens the railroads with costs that exceed those imposed by the workers' compensation system. However, this does not translate to improved safety. In fact, replacing FELA with the state workers' compensation system would, if anything, enhance the railroads' ability to make their operations safer by, for one thing, removing the present disincentives to both labor and management for finding out the true causes of railroad accidents.

There are indeed, as your questions suggests, in addition to humanitarian concerns, a number of factors which operate as strong incentives for ensuring safe railroad operations. First, railroad accidents expose the company to a great deal of financial liability totally unrelated to FELA. In the case of Amtrak, passengers who are hurt can bring personal injury lawsuits against the railroad and collect damages if the railroad was at fault. Similarly, members of the public who are harmed as a result of a freight railroad accident or the release of a hazardous substance would have tort remedies against the carrier. Further, accidents also cost the railroad in terms of damage to equipment, and cleanup expenses in the case of a spill of a toxic substance. This potential financial exposure alone creates a strong incentive to keep operations safe.

Second, the Federal Railroad Administration has broad authority over railroad operations. FRA safety requirements are comprehensive, covering railroad locomotives and cars; appurtenances and appliances on rolling stock; track and roadbed; as well as the work hours of train and engine employees and other employees responsible for the movement of trains. Violation of these requirements can subject a railroad to fines ranging from $250 to $10,000. Additionally, under the recently enacted safety legislation a fine of $20,000 may be assessed for a grossly negligent violation or a pattern of repeated violation creating an imminent hazard of death or injury. The railroads have an obvious financial incentive to comply with FRA safety regulations.

Third, the competitive pressures of today's market also create an incentive to keep operations safe. An accident can result in the loss or damage of lading. Even if

the lading is not damaged it will no doubt be delayed in reaching its destination. In either case there is a cost to the railroad. It is obvious that any railroad which is victimized by numerous accidents will not be providing efficient service to its customers. Since efficient transportation service is what railroads sell, any carrier which is not sufficiently attuned to safety will suffer in its business.

Further, I would like to respond to a point that was made at the hearings. The labor panel suggested that employees would be less likely to be careful were they covered by worker's compensation as opposed to FELA because they know that under the former they can recover for injuries regardless of their own fault, whereas under the latter their recovery is reduced by the extent of their contributory negligence. This assertion is wholly without merit. Regardless of the system of compensation in place, an employee's overriding incentive to use care on the job is to avoid suffering bodily injury. It is ridiculous to suggest that an employee is somehow less concerned about suffering a painful and debilitating injury merely because his right to recover compensation (assuming he even thinks about it beforehand) is not conditioned on a showing of fault.

Finally, the transfer from FELA to workmen's compensation does not exonerate the railroad from liability. The railroad industry would still have to bear its fair share of the cost of employee work-related injury compensation (including a broader duty to assist in employee rehabilitation). Gone would be the adversarial relationship and the hit-or-miss jury verdicts. But the railroad would have to pay regardless of fault and would continue to be strongly motivated to reduce accidents and injuries.

Clearly the railroads have strong incentives to minimize workplace accidents and injuries regardless of the compensation system covering the industry. However, because it is a fault-based method of compensation, FELA is a poor incentive for railroad safety. Of necessity negotiation and litigation strategy, rather than objective investigation of accidents, becomes a paramount importance. FELA creates a financial incentive for both employer and employee to lay the blame for workplace accidents on the other party and thus makes the goal of improving safety more difficult to attain.

Question 2. As FRA Administrator testified, there has been a marked improvement in safety in the railroad industry. To what do you attribute that dramatic change?

What role has FRA enforcement played in enhancing safety?

Answer 2. As the FRA Administrator testified, and as noted in my own testimony, there has been a marked improvement in railroad safety during the 1980's. This has coincided with, and is largely attributable to, partial deregulation of the industry under the Staggers Act. Deregulation has reversed the trend toward financial decline experienced by the railroad industry in the 1960's and 1970's. As a result of the improved financial conditions which followed enactment of Staggers, railroads were able to make investments in new track and equipment and to undertake maintenance of existing facilities. This has resulted in a sharp drop in both accidents and injuries to employees.

Though I believe the financial revitalization of the railroad industry in recent years, has been chiefly responsible for the industry's improved safety record, FRA enforcement of its regulations has also been a factor. The FRA has utilized its enforcement powers both on a routine inspection basis and a system safety analysis basis. Under the latter approach the FRA will concentrate its efforts on a particular railroad, prepare a comprehensive report and sit down with the company's management to work out a plan to rectify any safety deficiencies. In short, FRA has played a role in assuring that the railroads continue along the path toward improved safety.

Senator EXON. Thank you, Mr. Dempsey.

Could you give me your ideas on the question that I asked of Mr. Claytor, about whether State laws would need to be changed? And in that regard and as a follow-up question, how do the two of you, who are old and very knowledgeable people in the railroad management industry, respond to the assertions that the rail industry is one of the most dangerous types of occupations and therefore rail employees deserve an extra protection, as allowed by FELA?

Mr. DEMPSEY. Mr. Chairman, as to the first question, Mr. Claytor's attorneys have done thorough research on this subject, as have ours, and we concur in their judgment.

As to the second, I will simply give you the data. These are Bureau of Labor Statistics data. In 1985, and that is the most recent year for which we have the data, the incidents rate for occupational injuries and illnesses in the rail industry were lower than in the areas of agriculture, forestry, fishing, construction, and the manufacturing of most durable goods and a number of non-durable goods industries.

So there simply isn't anything in the data available that would indicate that the rail industry is somehow uniquely unsafe.

Senator EXON. That data that you just cited, is that the percentage of people employed? Obviously, more people are employed in agriculture.

Mr. DEMPSEY. It is the rate of injuries per 100 full-time workers.

Senator EXON. Do you have anything to add to that, Mr. Claytor?

Mr. CLAYTOR. No, sir.

Amtrak I believe is just about in the middle of all industries. We are not ranked high in the railroad industry—at the time two years ago when the statistics came out, I think we had a few more injuries than the average railroad, so we were down at the bottom of the pile. So we were worse than many in the railroad industry.

But at least half of all the listed industries in this country were worse than we were in number of injuries per 200,000 man-hours.

And I just think it is not true that railroading is one of the most dangerous occupations.

Senator EXON. Originally, 80 years ago when this law was passed, to your knowledge was there any basis then, or why was the law passed?

Was it a labor protection measure, as part of a labor contract that was given to railroad workers? What was the reason for the establishment of this in the first instance?

Of course, there were not workman's compensation laws at that time, I suspect. Is it true that this came about as an extra protection that the railroad people thought they were entitled to and the railroads either agreed or were forced to pay it because of an Act of Congress?

Mr. CLAYTOR. Mr. Chairman, I was not quite here then. I almost was.

Senator EXON. Oh, I am sorry. I thought you were.

Mr. CLAYTOR. I always understood, of course, at the time in 1908 the principal, the only really big heavy industry in the United States was railroads. We were head and shoulders over every other industry in the country from the standpoint of heavy-duty, of employment, and of almost everything else.

And we also were unionized, the only major industry that was fully unionized at the time. And I think that it was felt, the unions felt—and I think they had a good point—that an industry of this sort, that had absolutely no injury compensation system at all universally, ought to have one.

We were the number one candidate because we were the number one industry. No one had any workers' compensation. Workers' compensation was a concept that had not yet been thought of then.

So people understood court systems and jury trials, and so they just set up a system that provided for litigation to take care of the situation.

And subsequently, workers' compensation was developed and became universal, but FELA was already there and it just stayed there, and I think it should not have. I think it has certainly outlived its time.

But that is the way it came about.

Senator EXON. Thank you.

I would just point out for the clarification of the record, since Mr. Dempsey used agriculture as one of the industries that was more dangerous than the railroad industry, 80 years ago the railroad industry was not the major industry by that measurement. It was agriculture at that time.

And as big as you are today, you cannot hold a candle in the impact that you have on the nation and the world. Agriculture is still the number one industry. I just wanted to make that clear.

Senator Kasten.

Senator KASTEN. Mr. Chairman, thank you.

Mr. Claytor, I want to check through. You talked about the fact that you are not planning to end your career or to retire.

There are a couple of other things, though, in the statement from Mr. Hardin that I wanted a chance to give you a chance to reply to. I will just read this part of the statement and then—he said:

> It is very difficult how to comprehend how he in the last months of an illustrious rail executive career, would propose that the employees of Amtrak not be covered under the provisions of FELA and the railroad retirement system.

First of all, I want to point out that neither you nor I are talking about ending the railroad retirement system. Is that correct?

Mr. CLAYTOR. He was referring to another proposal that is not before this committee, in which we suggested that Amtrak could provide a fully funded pension plan over and above social security for all of our employees and pay them exactly the same they would get for retirement under railroad retirement, at less cost to both Amtrak and to the employee.

That is another proposition. It is not involved here.

Senator KASTEN. I just wanted to point out that the subject of this hearing and the effort is not to take Amtrak out of railroad retirement.

We are talking about a study that would make it possible for us to find out exactly how the process works, and my amendment has nothing to do with the railroad retirement system.

Mr. CLAYTOR. Absolutely not.

Senator KASTEN. The other point, and I want to read on:

> It is our understanding that in this same legislation, the many, many executive officers of Amtrak are asking for huge salary increases and apparently would pay for these by depriving the employees of FELA protection.

Does this have anything—I am not aware of huge salary increases.

Mr. CLAYTOR. No, there are no huge salary increases.

Senator KASTEN. If there were, we would be concerned about it.

Mr. CLAYTOR. I am sure he is referring to the fact that in the rail safety bill just becoming law the pay cap on Amtrak employees was terminated, which we have been asking for for many years, because the pay cap was preventing us from holding key employees

who were being hired away by such outfits as New Jersey Transit and the Metropolitan Transit of New York, the railroads and the airlines.

And I think he is assuming that, since the pay cap has been removed, there will be enormous pay increases; in fact, we are required to report to Congress all pay increases under this bill over executive level one.

Such a report will be made right after the first of the year, and I think you will find there will be very few and they will be very small.

Senator KASTEN. Thank you.

You in your testimony, also in your prepared testimony, discuss the safety training and observation program, the STOP program which you adapted from the Dupont company. And it clearly is a cooperative program, without this kind of adversarial tone that you portray in FELA.

Could you expand on that particular question, and I would like to ask you, if you would, to recall the anecdote which you mentioned to me a couple of weeks ago when we discussed this in terms of—I think the example from the Chicago to St. Louis train is a perfect example of this adversarial kind of system.

Mr. CLAYTOR. Yes. First, the STOP program. One of the problems with safety programs has been when you have a violation of a safety rule—you have a safety rule that says that a man has to wear a hard hat, and he shows up, consistently shows up, on the job without a hard hat.

Well, the general tendency is, well, if you cannot make him wear a hard hat we are going to take him out of service and punish him, and that has been the procedure.

The Dupont company came up, after a great deal of experiments in their own plants, which are the most dangerous in the country because they were explosives plants where this system was developed, with saying that is the wrong attitude.

Discipline for safety violations immediately creates the feeling that safety is something that management is for and therefore labor ought to be against, and you are going to punish us if we do not do it. It is like being late for work.

Do not do that. Abolish all punishment for safety violations by employees. Instead, have an education program as to why you have to wear the hat, why we want you to wear the hat, what happens if you do not wear the hat; and work together with the employee and the front line supervisor on doing that.

And the program consists of eight or ten different steps, each one taking some weeks, in different areas of safety: safety devices, safety procedures, and that sort of thing. And everyone learns those when we go through this.

And we have not had a safety punishment since we started this program. And our safety has improved. The key to safety is cooperation. If you do not have cooperation, you do not have it.

If you have anything that fosters anti-cooperation, fosters hostility, it makes it very difficult. And the STOP program is designed that eliminate that hostility.

Now, of course the whole business of getting into a legalistic fistfight every time there is an injury, which is what happens under

FELA, goes against that and makes the STOP program harder to become effective. We are going to make it effective anyway, or at least do the best we can.

But we would sure make a lot more progress if we did not have this other festering sore.

And what I mentioned was, we had a minor derailment on a passenger train. There was a bad place on the track. It was running quite slow. The train came off the track, bounced along the rails a little bit.

We had I think 150 passengers on the train. No one injured, no passengers injured. But we had three or four on-board service people who were reported with back injuries right away. And we just thought that that was a little bit extreme.

Senator KASTEN. In other words, there were no passengers that were injured at all, but the employees were reporting back injuries immediately?

Mr. CLAYTOR. Yes, reported injuries, that is right. And they may have been injured, it is possible. But it seemed unlikely.

Senator KASTEN. Mr. Chairman, I have additional questions I would like to submit in the record.

Thank you.

Senator EXON. Thank you, Senator Kasten.

Senator Pressler.

Senator PRESSLER. Well, thank you very much, and I was very glad to hear your statements here today, including your statement on Union Station.

Incidentally, I just toured Union Station this morning and I am very proud of what you are doing. I do hope you have a plaque showing some of the history of that beautiful building and the sculptures on it.

I think it is a very important thing to include with the project. I do not know if it is you or Secretary Burnley or who would be in charge of that, but I would be glad to help out in some way if I could.

Mr. CLAYTOR. Thank you.

Senator PRESSLER. I come from a state where we do not have Amtrak, and I probably would not be very interested in this hearing today, except that a very interesting thing happened in South Dakota.

A group turned up and held two press conferences and said that I was threatening a rail safety law. I could not imagine what that would be since I just voted for the Railroad Safety Act that passed. And it turned out that a group—two groups, one called the Illinois Public Action Council and another one called Citizens Action, had two press conferences attacking me for a brief remark in a recent hearing that I would be willing to support Senator Kasten's amendment from what I had heard of it.

My involvement was very benign up until that point, but I have decided to get actively involved and support it vigorously as a result of that.

But let me ask you about this group. Have you heard about either of these two groups that I just mentioned?

Mr. CLAYTOR. No, sir, I don't know them but I have heard of them because they produced a lot of statistics, I expect some of

which will probably be in this record, to try to show that railroads are unsafe, that passenger railroads particularly are unsafe. And the statistics are wholly irrelevant.

They include such things as highway crossing accidents and passenger injuries under an FELA problem, and FELA of course does not apply to either one. And railroad crossing accidents I consider to be highway accidents, not rail accidents.

And the whole thing, I think the statistics are completely phony. We have examined them and we have concluded that, and I think Mr. Dempsey has, too.

But beyond that, I do not know the source.

Senator PRESSLER. It is very interesting you should mention that, because an enterprising reporter, Bill Harlin, for the Rapid City Journal did some checking. He talked with a John Cameron of Citizen Action in Chicago. He said a group of FELA attorneys had paid for most of the $50,000 cost of that study you are talking about.

I think that is very interesting. Groups that go around with a different name than what they really are and have a tax exempt foundation and fly into states and put forth false information upset me, and I take them on head-on.

Now, let me ask you this. Are you aware that this group called the Illinois Public Action Council was recently fined $5,000 for making illegal contributions?

Mr. CLAYTOR. No, sir, I did not know that.

Senator PRESSLER. Well, another journalist found that. The point I am making here is that I think that this type of activity does not have any part in American politics, and I am glad that the journalists in my state did such a good job.

But when they held their press conference, Mr. Robert Creamer, he said that Senator Pressler was threatening a rail safety law. Is this a rail safety law?

Mr. CLAYTOR. No, sir. As I have tried to make clear, I think, if anything, it is an anti-rail safety law.

Senator PRESSLER. I think that is exactly correct.

And as a journalist found, this Illinois safety group with all these sanctimonious claims would be flying into South Dakota and probably thought that the local press would swallow completely what they were saying.

This reporter found that rail passenger fatalities in 1987 were up 74 percent from the previous year. Now, Creamer said that that is three times more fatalities than the airline industry when asked about that.

But the point is, these other industries are not under this so-called safety law. I wonder how they concluded that it was a safety law.

Mr. CLAYTOR. Their argument that it is a safety law appears to be that the high cost of injuries under FELA, the high cost to the railroad of injuries under FELA, forces the railroad to make greater effort to prevent accidents, and therefore induces safety.

I think that is utterly ridiculous, but that is the argument.

Senator PRESSLER. Do you have any groups such as this that Amtrak sends around; tax exempt groups going by names other than what they are, flying around the country?

Mr. CLAYTOR. No, sir.

Senator PRESSLER. Let me say as one Senator that I think that people should say who they are. If their studies are paid for by lawyers, they should say so. And I am a lawyer myself. I may be practicing law again in just two years if I get beat the next time I run, so I do not want to burn too many bridges.

But I find this very, very counterproductive. And I hope you do not have any groups similar to this, and if you do I hope that they are exposed. The journalists in my state exposed this group very nicely, and I thank them for their help.

I hope this group will come again. They are welcome. I think I will pay their way out there the next time.

Mr. CLAYTOR. Well, we at Amtrak have no lobbyists, and no groups that we are affiliated with in any way. We ourselves are a tax exempt company because we necessarily do not make any money.

Senator PRESSLER. But you call yourselves what you are.

Mr. CLAYTOR. We call ourselves what we are, and we do not employ anybody else to do our job. We do it ourselves.

Mr. DEMPSEY. Senator, I do not think I have submitted this for the record, but I would like to, Mr. Chairman. It is an analysis of the data that the Illinois Public Action Council has presented, and it is just phony from start to finish.

And I would like the opportunity to put that in the record.[1]

And finally, I wonder would you mind if the AAR contributed to Citizens Action, because it sounds like a good idea from our perspective to do that.

Senator PRESSLER. Mr. Chairman, I would like to put in the record that John Cameron of Citizen Action in Chicago said a group of FELA attorneys had paid for most of the $50,000 cost of the study.

Mr. DEMPSEY. Yes, we have that reference, to: June 15th I think it was, the article.

Senator EXON. Thank you very much, Senator Pressler.

I have never heard of the Illinois Civic Action group before, but certainly we must have raised at least $100,000 for them here this afternoon.

Senator KASTEN. Mr. Chairman, I just want the record to show that the exact same experience that Senator Pressler has just described in detail took place in Wisconsin, but they did not call themselves by the same name—in Wisconsin they called themselves the Wisconsin Action Coalition.

But they were in fact the people from the Illinois group, along with one or two other groups.

We went through the same kind of thing in terms of accusation of "undermining rail safety". The three of us worked on that rail safety bill. We passed that bill, and I think that clearly this whole effort seems to me to be people hiding behind different kinds of names and causes and groups.

I think it is counterproductive to the process.

Senator EXON. Thank you, Senator Kasten.

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[1] The submission was not reproducible.

Thank you, Mr. Claytor. Thank you, Mr. Dempsey. And we appreciate your coming and giving us your expert testimony this afternoon.

Mr. CLAYTOR. Thank you very much, sir.

Senator EXON. The final panel today is Mr. Geoffrey Zeh, the President of the Brotherhood of Maintenance of Way Employees, and he is also Vice Chairman of the Railroad Labor Executives Association; and Mr. Fred Hardin, the International President of the United Transportation Union.

Mr. Zeh and Mr. Hardin, would you come forward, please. On behalf of the committee, I want to take this opportunity to welcome both of you here. We are looking forward to your testimony.

In the interest of conserving time, we will at this time, without objection, accept in full the testimony that you both prepared for this meeting. We thank you for that, and now we would ask you to summarize.

Mr. Zeh, we will start with you.

STATEMENT OF GEOFFREY N. ZEH, COCHAIRMAN, COALITION FOR SAFE AND RESPONSIBLE RAILROADS, AND VICE CHAIRMAN, RAILWAY LABOR EXECUTIVES ASSOCIATION

Mr. ZEH. Thank you, Mr. Chairman.

I appreciate this opportunity to respond to Amtrak's proposal to be exempted from FELA for a three year experiment.

I am appearing before this subcommittee today in two capacities: first as Vice Chairman of the Railway Labor Executives Association; second, I am representing the Coalition for Safe and Responsible Railroads, of which I am co-chairman.

For today's proceedings, I would first like to comment on behalf of RLEA and then say a few words in my Coalition role.

We have heard a great deal of concern and interest expressed today about railroad safety. That is laudable because it is safety that we seek. Fundamentally, it is not compensation that railroad workers want. They want a safe workplace.

In the final analysis, safety is the best way to reduce compensation costs, not switching from one payment system to another. We simply do not agree with the picture Amtrak and other railroad companies have been painting about FELA, and we are opposed to Amtrak's proposal.

Practical experience has shown us that FELA's negligence liability structure does provide a positive incentive for safety in the railroad industry, while also providing an equitable means for injury compensation, and that there is nothing obsolete.

Fault-based liability providing direct accountability for corporate actions is neither old-fashioned nor inferior to no-fault worker compensation. It is important to remember that the system of state worker compensation programs was established as a compromise, first conceived at the turn of the century or earlier, in which workers gave something up in order to circumvent a legal system which at the time was stacked against them.

In order to receive any compensation, they gave up the right to sue and the right to full economic compensation.

When Congress enacted FELA in 1908, it had a dual purpose in mind: to provide a safety incentive within the industry while also providing fair compensation for injuries. Again, there is nothing old-fashioned about this notion. To the contrary, courts in a growing number of states are allowing workers essentially to step outside of the no-fault worker compensation systems to sue their employers under tort law.

In this way, general industry coverage is moving in the direction of FELA.

We have also heard a great deal about the escalation in FELA costs. I would like to make several comments on that point.

First, it is our understanding that a soon to be published study by University of Missouri Professor Oldfather confirms a recent historical pattern, which shows that between the years 1970 and 1984 workers compensation expenses increased 129 percent, while FELA expenses increased 42 percent.

Similarly, between 1974 and 1984 expenses under the Longshoremen's Act increased 286 percent, while FELA expenses increased 34 percent. These figures are all inflation-adjusted.

On an industrywide basis, the railroad companies say that total FELA payments are continuing to increase even while employment levels are decreasing. One element that helps explain this is the time gap between the occurrence of an injury and payment of a compensation award.

A second element is general inflation, and especially the rapid escalation in medical costs, which are included in FELA awards as well as worker compensation.

It is also important to note that the increased interest by Amtrak and the rest of the railroad industry in removing FELA from the statute books coincides with another development in the industry—the growing numbers of claims for hearing loss and occupational disease stemming from exposure to asbestos and other toxic substances being filed by railroad workers and retirees.

Without FELA the railroads, including Amtrak, would escape accountability for much of the financial responsibility for these types of injuries inflicted upon their employees.

Under state workers compensation, retired employees who constitute many of the occupational disease claimants are not covered at all. And in most states, it is very difficult for even pre-retirement employees to obtain occupational disease compensation.

I would also like to respond to the contention by Amtrak and other carriers that FELA is more adversarial and divisive. This is simply not so.

In practice, no-fault workers compensation systems have proven to be just as divisive, if not more so, and at least as dependent upon legal representation as FELA. An internal study by the Association of American Railroads found that 85 percent of FELA claims are settled directly between the rail companies and their injured employees, with no outside attorney involved and no suits filed. Only 1.1 percent of FELA cases actually end up in court.

Similarly, the GAO report on Amtrak compensation found that lawyers were retained in only eleven percent of all Amtrak FELA cases, including the 73 percent of cases in which zero settlements were made.

By contrast, studies including the GAO report on Amtrak's injury compensation have shown that contested cases and legal representation are frequent in state workers compensation. A recent article in the San Diego Law Review pointed out that a measure of the divisive nature of state workers compensation is the growing movement among state legislators to provide a civil remedy against retaliatory discharge of an employee for filing a workers compensation claim—27 states had enacted such protection by 1986.

Amtrak and other carriers often claim that the adversarial nature of FELA is promoted by the employee's legal counsel operating on a contingency fee basis, which they say can be as high as 40 percent. I submit that in most cases the legal counsel recommended by rail unions to handle FELA cases agree with their clients to a 25 percent contingency fee.

Now, Mr. Chairman, I would like to say a few words on behalf of the Coalition for Safe and Responsible Railroads. The Coalition was formed a year ago by a number of organizations that feel liability law and FELA in particular provides a critical, important incentive for rail safety in the railroad industry.

The members of the Coalition include railroad labor organizations, consumer groups, representatives of personal injury attorneys, and environmental interests. The fact that these organizations have coalesced on this issue indicates the broad public policy significance of FELA from a number of perspectives.

Railroad labor has a strong interest in maintaining FELA's negligence liability provisions because of its effectiveness in providing equitable compensation for work-related injuries and its effectiveness in promoting safer work conditions.

Environmental interests bring to the Coalition a growing concern over railroad transportation of hazardous materials and see FELA as an important incentive for railroads to avoid conditions that can lead to toxic chemical spills or other releases of hazardous materials.

The consumer organizations associated with the Coalition have a long history of working to preserve negligence liability law generally for the protection of consumers, workers, and the environment, and they see FELA's protection as part of that effort.

The Coalition has included in its written testimony a detailed discussion of the GAO report on Amtrak compensation costs. I would like to point out two items in that discussion.

First, the GAO analysis of two state programs demonstrates that worker compensation varies dramatically and arbitrarily from state to state.

Second, the argument that FELA leads to excessive settlements is itself overstated. The GAO report shows that high awards are relatively unusual. Nearly three-quarters of all Amtrak cases resulted in no payment other than lost wages, which is provided for both in FELA and state workers compensation.

Only one percent of the cases resulted in settlements of $100,000 or more, and the awards of this magnitude result from cases in which the company has accepted the factor, juries have found that the injury is severe and the economic damages to the employee or his survivors high.

Mr. Chairman, this completes my testimony on behalf of both RLEA and the Coalition for Safe and Responsible Railroads.

Thank you.

[The statement and questions and answers follow:]

STATEMENT OF GEOFFREY N. ZEH, COCHAIRMAN, COALITION FOR SAFE AND RESPONSIBLE RAILROADS

My name is Geoffrey N. Zeh. I am President of the Brotherhood of Maintenance of Way Employees, and serve as cochairman of the Coalition for Safe & Responsible Railroads, I am pleased to present the coalition's comments on Amtrak's proposed exemption from FELA.

The coalition was formed a year ago by a number of organizations that feel liability law generally, and FELA in particular, provides a critically important incentive for safety in the railroad industry. Members of the coalition include railroad labor organizations, consumer groups, representatives of personal injury attorneys, and environmental interests. A list of the membership is included at the end of my statement.

The fact that these organizations have coalesced on this issue indicates the broad public policy significance of FELA from a number of perspectives. Railroad labor has a strong interest in maintaining FELA's negligence liability provisions because of its effectiveness in providing equitable compensation for work-related injuries and its effectiveness in promoting safer working conditions.

Environmental interests bring to the coalition a growing concern over railroad transportation of hazardous materials, and see FELA as an important incentive for railroads to avoid conditions that can lead to toxic chemical spills or other releases of hazardous materials.

The consumer organizations associated with the coalition have a long history of working to preserve negligence liability law generally for protection of consumers, workers and the environment, and they see FELA's protection as part of that effort. For example, a policy resolution of the Consumer Federation of America (a member of the coalition) reads: "Particularly in light of the increasing volume of toxic chemicals, nuclear materials and other hazardous substances transported by railroads, CFA . . . opposes any effort to weaken the safety incentives and liability responsibilities that the Federal Employers' Liability Act now places on the railroad industry."

In response to Amtrak's proposal that it be exempted from FELA for a three-year trial period, we would like to share with the Transportation Subcommittee the coalition's comments on the 1986 GAO report entitled "Amtrak: Comparison of Employee Injury Claims Under Federal and State Laws." The coalition opposes the proposed Amtrak exemption to FELA, and we feel the GAO report contains a good deal of information that helps explain why the railroad injury liability law should be maintained.

The GAO report compared compensation under FELA with compensation that would have applied had rail workers been covered by state worker compensation systems.

Amtrak has pointed to the GAO report in support of its effort to repeal FELA. In doing so, Amtrak points to the report's finding of potentially reduced payments to injured workers under state compensation systems, and hence potential cost-savings for Amtrak. However, this is an overly simplistic interpretation of the GAO report, ignoring many other findings in the study.

Comparison of FELA with state compensation systems is a complex issue, and the GAO report provides information on numerous aspects of the matter. Careful reading of the GAO study, in fact, helps demonstrate many of the reasons FELA should not be repealed.

On the following pages, we discuss points made evident by the GAO report which refute arguments railroad companies have made for repealing FELA—and which help show why FELA should be maintained.

EXTREME VARIATION AMONG STATE BENEFIT LEVELS

One of the arguments raised by Amtrak and other rail companies against FELA is that the federal liability system does not provide uniformity in compensation for similar injuries. As the GAO report makes clear, however, if lack of uniformity is a problem, replacement of FELA with state worker compensation law is not the answer.

Under state worker compensation law, work-related injuries are compensated according to fixed, pre-set schedules. However, the schedules, maximum dollar limitations, payment durations and other qualifiers vary dramatically among the states. As a result, workers from two states with exactly the same injury and exactly the same wages can be compensated at two completely different levels.

To account for this variation among state programs, GAO picked two states in which Amtrak has a large number of claims in order to provide a range of comparisons with FELA. The states used by GAO were Connecticut (for the high range) and Indiana (for the low range).

The GAO report shows that, in the year studied, if FELA claims had been paid under Indiana law, the same group of injured workers would have received less than one-third the compensation they would had been paid under Connecticut law ($65 million in Indiana, and $21.2 million in Connecticut).

On average, if FELA injury cases had been paid under the Connecticut system, an injured railworker would have received $600 less than his FELA award. But under the Indiana system, the average injured rail worker would have lost $3,900 compared to his FELA compensation.

Another way of viewing the variation among states is to examine the payments for permanent total disabilities as presented in the GAO report. For this category of very serious injury, payments to rail workers under the Connecticut system actually would have been $3.2 million *more* than the FELA payments, while under Indiana's system the payments would have been $4.9 million *less* than FELA.

To make matters worse, Connecticut and Indiana do not represent either the high or low extreme among all the states in the nation. Thus, replacement of FELA with state worker compensation would result in even more radical state-by-state variation in compensation levels than shown in the GAO report.

The variation among state programs creates special problems for rail workers whose jobs involve travel. When an injury occurs, which state's program should apply—the state where the accident takes place? The state in which the employee resides? The state in which the company is domiciled?

As pointed out in the authoritative reference, Larson's Workmen's Compensation Law, substitution of FELA with state programs raises "the state-versus-state problem, which in the case of employees actually moving from state to state can produce some of the most complex tangles in all of compensation law." (Section 91.74)

FEW FELA CASES RESULT IN HIGH SETTLEMENTS

One of the arguments against FELA raised most frequently by rail companies is that the federal liability law results in excessively-high court awards. The GAO report, however, shows that high awards are relatively unusual.

Nearly three-quarters of all Amtrak cases resulted in no payment other than medical cost reimbursement (which is provided in both FELA and state worker compensation).

Only 1% of the cases resulted in settlements of $100,000 or more. Presumably, the awards of this magnitude result from cases in which the injury is severe, the economic damages to the employee are high, and the company's negligence is significant.

According to GAO, out of all Amtrak cases in the year studied, settlements for compensation other than medical costs were as follows: 73%, $0 (other than medical costs); 10%, less than $1,000; 9%, $1,000–9,999; 6%, $10,000–99,999; 1%, $100,000 or more.

WORKERS RECEIVE MORE COMPLETE COVERAGE UNDER FELA, INCLUDING COMPENSATION FOR OCCUPATIONAL DISEASE

The GAO report explains that injured workers have broader coverage available to them under FELA than under state worker compensation. This broader coverage helps assure that rails workers can recover their losses more completely for work related injuries and illnesses.

FELA and state worker compensation are similar in that both systems pay for employee's medical and rehabilitation costs. Beyond these costs, state benefits compensate injured workers only for the loss of wages. In contrast, under FELA, workers may receive compensation for wages and other losses found to be relevant, such as pain and suffering.

GAO further points out that FELA makes railroads liable for their employees' occupational diseases and illnesses, as well as injuries.

Coverage of occupational disease and illness is extremely important. There is increasing concern over the health effects to rail workers from long-term exposure to

asbestos and noise, as well as growing exposure to toxic materials shipped by rail—ranging from nuclear waste to countless medical products. State worker compensation programs are notorious for their failure to deal adequately with occupational disease. This is a glaring weakness in state worker compensation compared to FELA. In most states, it is difficult or impossible for pre-retirement workers to obtain disease compensation. And for workers who have retired—which is the point in life when occupational diseases often become apparent—worker compensation does not apply at all.

FELA'S LIABILITY SYSTEM IS A SAFETY INCENTIVE FOR COMPANIES AND WORKERS

The injury compensation system for rail workers is based on liability since, as GAO points out, FELA is a negligence statute. Every injury and illness claim triggers an investigation to determine cause and fault in order to arrive at the compensation settlement.

As a result, rail companies have a strong financial incentive to provide safe work places. If accidents occur, the railroad's compensation costs be reduced by having taken steps their negligence. In other words, the lower their degree of fault, the lower their settlement expenses.

Similarly, under FELA, rail workers have a financial incentive tc avoid accidents. As indicated in the GAO report, FELA compensation to injured workers is reduced by the percentage of the injured employee's own negligence.

By contrast, state worker compensation programs do not provide these types of incentives for either companies or workers. This is because they are fixed-payment, no-fault systems. Compensation is paid at predetermined levels for any given injury, regardless of fault.

Under state worker compensation, companies do not carry the risk of higher awards due to higher degrees of negligence. For employees, there is no risk that a compensation award will be reduced because of his or her negligence.

STATE COMPENSATION BENEFTIS ARE GENERALLY INADEQUATE

One of the most serious problems with state worker compensation systems is that many workers fail to be compensated fully. Regardless of the adequacy or inadequacy of a state's injury award schedule, the actual dollar amounts paid are limited by "maximums" that often fall far short of many workers' lost-wage levels, and by duration limits that are often unrealistically short.

Therefore, it is not surprising the GAO report found Amtrak would have saved $2.7 million–$17.4 million under the Connecticut or Indiana state programs. These potential "savings", however, would translate to non-payment of damage compensation from the perspective of injured railroad workers.

In addition, as discussed previously, state worker compensation systems generally fail to provide compensation for occupational diseases. Under FELA, occupational diseases are included within the concept of injury.

To the extent state compensation awards would not adequately cover the costs suffered by rail workers from injuries or illnesses, rail workers would be forced to turn to the public welfare system. Shifting away from FELA coverage, therefore, would shift a portion of compensatory costs away from the railroads and place them on the public taxpayers.

THERE IS LITTLE DIFFERENCE IN ATTORNEY REPRESENTATION BETWEEN FELA AND STATE WORKER COMPENSATION

One of the claims made by Amtrak and other railroads is that attorney fees constitute an excessive portion of their compensation payments. Their point is that, because FELA is a negligence liability system, lawyers are used by injured workers in carrying their cases forward, and that the attorneys' contingency fees are built into the awards.

The GAO report shows, however, that the use of attorneys and attorney contingency fees is similar under both FELA and state worker compensation.

According to GAO, "attorneys participated in 41 percent of Amtrak's cases closed in 1984 when the settlement was greater than zero (other than compensation for medical costs)." Since 27% of the cases involved dollar settlements, attorneys were involved in only 11% of all Amtrak FELA cases.

Regarding state worker compensation systems, GAO reports that the experience is strikingly similar. GAO found that lawyers are involved with worker compensation in a comparable percentage of cases and with comparable contingency fee arrangements. "Employees who appear before state hearing officers or who appeal

their cases to the state court are almost always represented by attorneys. In fiscal year 1985, approximately 4 percent of Connecticut's claims received formal hearings . . . (and) 5 to 6 percent of Indiana's annual cases receive hearings. State officials said that these are also contingency fee cases, so a comparable portion of these awards would be allocated toward attorneys' fees."

Thus, it can be seen that changing coverage from FELA to state no-fault systems would not end, or even materially alter attorney representation or the use of attorney contingency fees in compensation cases. Under both systems, attorneys are involved to a similar degree.

AMTRAK'S COST-SAVINGS MAY BE OVERSTATED

GAO lists several qualifications to its findings, indicating that its methodology may overstate the savings Amtrak would have realized by coverage under state worker compensation in the year studied. In summary, these qualifications are:

Some employees who did not file claims under FELA might file under state worker compensation. GAO concludes, "If employees would file and receive compensation for additional claims under state systems, our estimates overstate the likely decrease in costs to Amtrak under state rules."

GAO assumed "routine application of the states' rules" in comparing FELA settlements to the state systems. However, GAO points out that under the state systems any of the claimants could appeal to a hearing officer or state court, and the final award could have been different (presumably higher).

GAO points out that switching to state worker compensation systems may result in an increase in several elements of Amtrak's overhead costs. These include required contributions to "secondary injury" funds (not required under FELA); new administrative and legal costs because of the need to work within a large number of state compensation systems (rather than a single Federal statute); and new administrative costs for managing serial payments of awards (rather than making lump-sum payments under FELA).

QUESTIONS OF THE CHAIRMAN AND THE ANSWERS THERETO

1. Regarding coverage of occupational disease.

In recent years, as hearing loss, asbestosis, and other occupational diseases have become recognized as widespread problems in the railroad industry, FELA has proven to be an effective means for delivering adequate compensation to large numbers of injured workers, many of whom are retirees. In contrast, one of the most widely recognized shortcomings of state worker compensation is its poor record in providing compensation for occupational diseases. Even though virtually all state workers compensation laws now have provisions that technically cover occupational diseases, including hearing loss, in practice the recovery of compensation for occupational diseases remains extremely difficult to obtain in most cases. When disease compensation is obtained, the compensation level generally is inequitable in relation to the damage that has been suffered. A report by Crum and Forster Insurance Company's Occupational Disease Task Force, entitled "Role of the State Worker's Compensation System in Compensating Occupational Disease Victims" described the situation as follows:

> "Although occupational disease claims are being paid in most, if not all, jurisdictions, the states vary in statutory and administrative provisions and how those provisions are interpreted, producing variations in compensation for occupational diseases.
>
> "For example, some state laws still include unrealistic time and exposure limitation rules; imprecise definitions of compensable occupational diseases; and arbitrary limits on benefits for certain types of diseases. Other state laws eliminate certain illnesses due to their "ordinariness" and require evaluation of claims for the presence of an accidental occurrence. Some states require that toxic materials or working conditions causing a disease must be wholly responsible for it, apart from any other cause. Other states require that a worker be exposed to a toxic substance for a minimum of five out of the last ten years preceding the claim and that at least two of those five years were in the state where the claim is made. Administrative barriers, often a result of statutory ambiguity, also abound.
>
> "Employers frequently contest occupational disease claims, not only because of the difficulty of defining diseases and proving their work-relatedness, but also because they fear that accepting the claim may widen the scope of coverage under the law."

In short, few workers suffering occupational disease are successful in obtaining worker compensation benefits, and those who do are likely to receive inadequate benefits. State worker compensation is especially ineffective for retirees. The latency period for disease manifestation makes it difficult for retirees to satisfy the legal requirements to show that their illness arose out of and in the course of employment with a former employer, and furthermore, to satisfy those requirements within the worker compensation law's statute of limitations. And if a retiree does succeed in obtaining worker compensation, he or she no longer has any wages to replace, which is the main benefit worker compensation is supposed to provide.

On the other hand, FELA has proven to be an adequate and flexible remedy for victims of occupational disease. Either by settlement or jury verdict, benefits can be tailored to the situation of the case, whether for a current or retired employee, taking into account the full range of costs suffered by the victim, including pain and suffering.

2. Examples of FELA serving as an incentive for improving safety conditions.

FELA raises the possibility of open-ended compensation awards for injured workers. As a result, FELA brings attention to hazardous conditions and stimulates action to alleviate the hazards in a way that worker compensation cannot (because of worker compensation's low, fixed compensation schedules, and because worker compensation separates the level of compensation from any connection with employer fault), and in a way that even safety regulation often cannot (because low penalties serve inadequately as incentives and because there are too few safety inspectors to insure enforcement).

To demonstrate some of the ways FELA serves as an incentive for safety, my testimony listed several FELA cases that have helped bring about improved safety conditions. As requested, the following provides additional details about those cases.

Strohmaier v. Amtrak - Mr. Strohmaier was an electric traction worker and on the night of his injury was working on the Northeast Corridor for Amtrak. In the course of his duties that night, he was working with a gang of men maintaining high voltage wires for the trains running on the Northeast Corridor. On the night of his death, Mr. Strohmaier was ordered by his foreman to go up a signal bridge in order to apply a precautionary ground, or what is more commonly known as a grounding stick, to the high tension line while the power was still fully on in these high tension lines. The bridge on which Mr. Strohmaier was walking consisted of two steel beams and he walked out on the bridge with one foot of each beam. There was nothing between the two beams other than an open space which was direct access to the high

tension lines. Mr. Strohmaier fell from the "bridge" onto the high tension lines and was burned to death. Amtrak subsequently issued a memorandum to all individuals doing this type of work which stated that no employee was to go on any steel signal bridge to perform any maintenance until it was fully planked, in other words, until there was a complete floor for the employee to walk on above the high tension lines. This memorandum further instructed all employees doing this type of work that no employee was to go on the signal bridges while the high tension wires were live. All signal bridges along the entire Northeast Corridor, following the filing of this case, were fully decked so that the possibility of falling through this "bridge" was almost impossible. It is our contention that Amtrak's desire to avoid future FELA awards for accidents like Mr. Strohmaier's was a much greater incentive for their corrective action than was any regulatory action. In this case, OSHA asserted jurisdiction, but fined the company less than $1,000. It is our understanding that the fines were appealed and never paid. Even if the fines had been paid, they were far too small to serve as an incentive to take corrective action.

The Kinney Series of cases were five individual cases which arose out of an incident which occurred in the Amtrak Beach Grove Facility in Beach Grove, Indiana. These workers were using a set of tapes which could be attached to an electrical wire and then written on for identification purposes. The tapes were applied with a heating element requiring a great deal of heat and in one bundle of wires there may have been as many as 50 or 100 of these tags attached. A new batch of tags had come into the facility shortly before these men began to experience problems. The problems that the men began experiencing were nausea, sweating, lack of energy, loss of weight and eventual hospitalization for at least three of five of the employees for respiratory problems which they were experiencing after working on the application process of these tags.

These employees knew that there was something wrong in the shop in which they were working, something in the environment or in the equipment which they were using which was causing their problem but they had no way of identifying what the problem was. They were not receiving any response from Amtrak in their request to find out what problem may have existed to cause the reaction outlined above.

Shortly after an FELA counsel began representation on behalf of these individuals, Amtrak started an investigation into what was occurring in the shop where these men worked. A medical article was located, and submitted to Amtrak, which showed the relationship between the respiratory problems that these men were experiencing, smoking and the presence of intense fumes such as those being emitted when the aforementioned tags were exposed to extreme heat. The fact that these men had brought claims against

the railroad brought to light the chemical reaction which resulted from the residual by-products of cigarette smoking on the men's hands combining with the chemical make-up of the tags in the presence of severe heat which ultimately resulted in a fume inhaled by these men which caused respiratory problems. As a result of this revelation, the railroad installed washing facilities outside of the room in which this tagging process took place and all men, especially those who smoked, were required to thoroughly wash their hands prior to starting their shift. In addition, as a further safety measure, it is thought that Amtrak started using a different brand of tag for this particular job.

Gorman v. Amtrak - Mr. Gorman was a trackman working with a crew that was replacing rail on the Northeast Corridor on a very hot summer day. While removing an old section of rail in the road bed because of expansion of the rail due to the heat, it catapulted free and Mr. Gorman's leg was pinned between the old rail and the rail running parallel to it. Mr. Gorman's leg was fractured in several places, his condition required special fusion operations and although a fusion was finally achieved, he has some disability with respect to his leg to this date. A structured FELA settlement was worked out with the railroad. It is believed that largely because of the attention the FELA procedure brought to this type of accident, Amtrak procedure now is to do this type of rail replacement only at night if it is during a period of extreme heat, or, if it has to be done during the day, to make sure that extra safety precautions are taken so that individuals are not placed in a position similar to Mr. Gorman's.

Asbestos Litigation - Subsequent to the filing of hundreds of asbestos claims against railroads across the United States by FELA law firms, the railroads have virtually ceased to use asbestos as an insulating product in their shops. They, likewise, have undertaken programs to remove all the asbestos insulation form existing buildings which are still in use. In addition, whenever any other employees are required to work with asbestos, they now are provided with respirators and other precautionary measures are taken against the inhalation of asbestos dust by employees. A review of the "minutes of the proceedings of the American Railway Association, Medical & Surgical Section" indicates that as early as 1932, the railroads knew that the inhalation of asbestos dust was an industrial hazard and was dangerous to their employees.[1] They set forth as early as 1935, the appropriate measures to be taken to avoid the

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[1] See Excerpts from meetings of the American Railway Association, Medical Surgical Section, held June 26-27, 1933, June 10-11, 1935, June 7-8, 1937, June 15-16, 1939, June 10-11, 1940, April 2, 1951, March 31, 1952, April 6, 1953, and March 24-26, 1958. We can supply these excerpts.

inhalation of this dust and the exposure of their employees to its harmful effects. However, none of these actions to avoid the inhalation of asbestos dust and general exposure to asbestos were ever taken until the hundreds of FELA lawsuits were instituted.

Hearing Loss Litigation - for years, the railroad industry has known about noise induced industrial hearing loss. This is evidenced by the minutes of the proceedings of the American Railway Association, Medical & Surgical Section.[2] Until recently when hundreds of lawsuits were filed under FELA against the railroads, alleging industrial noise-induced hearing loss, the railroads took virtually no action to protect their employees from such noise. Since the lawsuits began:

a) The railroads have begun to educate their supervisory personnel on the harmful effect that certain levels of industrial noise can have on an individual's hearing even if the hearing loss is limited to higher frequencies as opposed to frequencies ordinarily related to speech.

b) The railroads, including Amtrak, have begun to conduct annual hearing tests on employees throughout their entire system in order to identify those individuals with noise induced hearing loss that may require hearing protection.

c) The railroads have begun to identify those areas in shops or those types of machinery or tools where hearing protection is required in order to prevent noise induced hearing loss.

d) The railroads have begun to require individuals with high frequency noise-induced hearing loss to wear hearing protection. In addition, those individuals who are exposed to certain noise levels are also required to wear hearing protection. The railroads have finally begun to invest money into purchasing hearing protection devices which have been available to industry in general since at least the early to mid-1950's. In addition, some efforts have been made by all the railroads, including Amtrak, to reduce the noise output of various pieces of equipment.

The testing mentioned above on younger employees, resulting directly from the onslaught of hearing loss claims, will help future generations avoid noise-induced hearing loss, and will help the companies reduce future claims.

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[2]See excerpts from meetings of the American Railway Association, Medical Surgical Section, held May 26, 1925, June 4-5, 1928, March 28-30, 1957, 1966, and 1969. We can supply these excerpts.

The protection devices necessary to avoid this type of hearing loss have been available for years and the hearing loss conservation programs started by some companies, such as DuPont, in the mid-1950's could have been started by the railroads at the same time. It was not until the railroads were faced with claims under FELA that they began the education process, regular testing programs, providing hearing loss protection devices, and instituting hearing loss conservation programs.

Amtrak, for example, during the last several years has developed a hearing loss conservation program, began testing their employees system-wide, and began to provide proper hearing protection, not only for those individuals with high frequency hearing loss but also for the next generation of young employees who are exposed to certain dangerous levels of noise. The money was not expended by the companies, including Amtrak, however, until they were faced with these claims and knew that they would have to start providing these safety measures in order to prevent future claims.

QUESTIONS OF SENATOR EXON AND THE ANSWERS THERETO

1. If railroads are increasingly safe, how can FELA be justified for the rail industry when its competitors are covered by worker compensation?

There are two answers to this question. First, railroads remain unsafe for workers. As explained more fully in response to Senator Kasten's question #2, statistics which at first appear to indicate rapidly increasing safety improvements in recent years in the rail industry can be misleading. Miles of trackage and numbers of employees in the industry have shrunk rapidly in recent years. Therefore, reduced overall numbers of accidents and injuries do not indicate a direct correlation with safer conditions. In fact, improvements in safety have not kept pace with the industry's shrinkage. While the number of injuries dropped by 40.5% between 1980-1985, the incident rate of injuries has changed by only 9.7%, and for one category of employees (maintenance of equipment) the incident rate of fatalities increased by 27.8%.

Second, regardless of trends in railroad safety statistics, railroad workers should not have to forfeit the superior injury compensation system they have through FELA just because workers in other industries have inadequate coverage through worker compensation. The history of FELA and worker compensation is instructive. Both are products of the industrialization that emerged at the turn of the century. Reacting to grossly unsafe conditions in railroading, Congress enacted FELA to ensure that injured railroad workers would have access to compensation through the courts where, at that time, workers' interests were almost always blocked. Workers in other industries were not successful in obtaining similar access to legal rights, and for them a compromise was devised in the form of no-fault worker compensation.

In this compromise, general industry workers gave up several significant rights -- the right to sue their employer, the right to recovery of full lost wages, and the right to recovery for other items such as lost potential for increased earnings and pain and suffering. In return, they were supposed to be given the assurance of getting at least some degree of wage compensation as well as medical costs, and getting them quickly and automatically.

As described in a 1986 article in the Cincinnati Law Review (submitted with my responses as Appendix II), "Under workers' compensation acts, injured workers accept inadequate compensation for their losses as the exclusive remedy against employers, and the system guarantees recovery for injuries within its scope regardless of whether employers are at fault for the accident." The article further points out that "Recent judicial exceptions to the exclusive remedy afforded by workers' compensation statues illustrate dissatisfaction with the system as originally bargained." (The latter point is discussed further in my response to Senator Exon's question #2, below.)

Over the years, worker compensation has proven to be far less than automatic in payment, and often not quick. In most states, worker compensation payment levels remain low and, as explained in response to Senator Hollings' question #1, the performance record of occupational disease compensation is particularly inadequate under state worker compensation.

In short, state worker compensation is a compromise system that has not lived up to its promise. In contrast, FELA has worked well for railroad workers, both for providing injury and illness compensation and for providing a safety incentive in their industry. Railroad workers should not have to give up either of these rights that FELA gives them -- full injury compensation and an incentive that contributes to safer working conditions.

2. Information about injured railroad workers left without compensation under FELA.

There appears to be a widely held misconception that significant numbers of injured railroad workers are left with no compensation because FELA awards are based upon findings of fault. This is not the case, for two reasons. The first reason relates to injury compensation provisions under the railroad retirement system, and the second relates to FELA's structure as a comparative negligence statute.

First, virtually every railroad employee automatically has partial wage-replacement benefits available through the railroad retirement program for any disabling injury, regardless of fault. Through these provisions, up to $500 per month is available for periods ranging from up to six months to up to one year. If the injured employee subsequently receives an FELA award, the railroad retirement system is automatically re-paid from the FELA award for any of the benefits the injured worker has received from the retirement program. It should be noted further that most railroad employees are covered also by negotiated supplemental insurance programs that provide additional benefits to injured workers, regardless of fault.

Second, FELA is a comparative negligence statute which has been interpreted by the courts in such a way that a railroad's negligence in the slightest degree results in liability being assigned to the railroad. Furthermore, FELA is applied on the basis of pure comparative negligence. On this basis, some compensation is available even if the majority of fault is attributed to the worker -- even in the highly unlikely event that a jury were to find his or her fault to be as high as 99%. While the award in such a case may be reduced, it would not be eliminated. This is different from some other comparative negligence statutes in which an arbitrarily-established degree of fault, such as 50%, acts as a limitation beyond which no compensation is available.

For all practical purposes, the attribution of fault under FELA influences the amount of compensation, far more than the availability of compensation. The fact that an employee may have contributed through his or her own negligence to the cause of injury rarely bars an employee from receiving some compensation under FELA. If an inured railroad worker were to receive no compensation under FELA, he or she would still have compensation available under the railroad retirement program and supplemental insurance as described above.

QUESTIONS OF SENATOR KASTEN AND THE ANSWERS THERETO

1. Regarding coverage of occupational disease.

In my full statement submitted to the Subcommittee I did not claim that the motivation of the railroads in shifting over to workers compensation is to escape liability for occupational diseases. It is reasonable to assume, however, that it is one of the motivations. As stated in my testimony:

"It is also important to note that the increased interest by Amtrak and the rest of the railroad industry in removing FELA from the statute books coincides with another development in the industry: the growing numbers of claims for hearing loss and occupation disease stemming from exposure to asbestos and other toxic substances being filed by railroad workers. This is one area in which railroads undeniably are facing increased compensation costs.

"Without FELA, the railroads, including Amtrak, would escape accountability and much of the financial responsibility for these types of injuries inflicted upon their employees. Under state worker compensation, retired employees (who constitute many of the occupational disease claimants) are not covered at all, and in most states it is very difficult for even pre-retirement employees to obtain occupational disease compensation."

The basis for that statement is two-fold. First, far fewer railroad employees who are injured by hearing loss or other occupational disease would be likely to receive compensation under state worker compensation. Despite the fact that state compensation laws include provisions to cover occupational disease, in practice, the record of workers actually receiving occupational disease compensation is dismal. As explained more fully in response to Senator Holling's question #1, a daunting array of barriers stand in the way of disease compensation recovery under state worker compensation programs, including statutes of limitations that are inconsistent with disease latency periods, arbitrary definitions, employer contestations, and questions about applicability of the programs to retirees.

The second basis for the statement is that even for those workers who might recover under state compensation, the costs to the industry are likely to be far less than under FELA. Pain and suffering, for instance, is not compensable under state compensation; and retirees can recover little, if anything, under worker compensation since they no longer have wages to replace (which is a primary purpose of worker compensation).

In summary then, switching from FELA to state worker compensation would allow railroads to escape accountability and much of the financial responsibility for occupational diseases, as stated in my testimony.

2. Regarding FELA as an incentive for safety.

(a) Is FELA the strongest incentive?

FELA is one of a number of important incentives for safety in the railroad industry. In some respects it is the most direct and efficient safety incentive. Because it is grounded on fault-based liability, FELA establishes an ever-present economic incentive for avoiding hazardous situations which is felt uniformly as a safety incentive in every railroad, irrespective of the management's operational style or it's level of motivation. FELA's force as a safety incentive is automatically present; it is not dependent upon government bureaucracy, administrative rulemaking or the presence of inspectors.

Senator Kasten's question asks whether several specific items provide greater safety incentives than FELA:

o "Efficient service" -- The quest for efficiency can be either a help or hinderance in achieving safety, depending on an individual railroad management's operational style, philosophy, and objectives. A management oriented towards long-term objectives is likely to recognize that safety is one aspect of efficiency. Such a management however, may or may not be successful in converting into operational practices its recognition of the value of safety; at best, the value of efficiency as a safety incentive is indirect and difficult to sustain. On the other hand, a management more focused on the short term is likely to interpret "efficiency" as "cost-cutting." In this situation, safety is imperiled. When management applies pressure throughout the company for this type of "efficiency", some of the first things to go are training, adequate staffing, and equipment maintenance, all of which have negative effects on safety. By comparison, FELA serves as an economic incentive for safety automatically and equally in all railroads.

o "Minimizing injuries and costs associated with accidents" -- Without question, this objective is linked to achieving safety, and FELA is the most direct means of converting the objective of minimizing injuries and associated costs to an operational incentive. This objective, in fact, is part of what FELA is all about. Railroads can minimize their costs associated with accidents, i.e., FELA awards, by maximizing safety.

o "Compliance with Federal safety requirements" -- Safety regulation is essential for protecting railroad workers,

passengers, and the public, but regulatory intervention by itself does not provide sufficient incentive for safety in railroads. Effective safety regulation is a function of the safety laws and their implementation. Although the Railroad Safety Act has been improved by recent amendments, it remains far from perfect and its implementation has long been inadequate. The FRA's own safety assessment of CSX, for instance, found systemic failures within the company to establish means to comply with safety requirements. By extension, this finding demonstrates a failure by FRA to enforce safety requirements with enough stringency to stimulate adequate systemic responses by the company. One of the weaknesses of the safety regulatory program is FRA's failure to use penalties effectively as an incentive for railroads to prevent safety defects. In 1986 the FRA imposed fines against the railroad industry that averaged only $10 per cited defect. This does not constitute an effective safety incentive. In contrast, FELA's potential for open-ended injury compensation awards acts as a constant, powerful incentive for providing safe conditions, and it has proven to work well as a complement to safety regulatory programs.

In the final analysis, it is pointless to argue about whether FELA is stronger as a safety incentive than regulatory programs or other incentives. The point is that many forms of safety incentives are needed. Railroading is dangerous by nature both to workers and the public. FELA was purposefully designed by Congress to make railroads more conscious of safety by holding the railroads liable for worker injuries. No fault worker compensation has precisely the opposite intent: to insulate employers from liability, thus rendering injury compensation neutral as a safety incentive. From the standpoint of safety in the railroads it would be a step in the wrong direction to replace FELA with worker compensation; FELA serves as one of the effective tools for rail safety, and we need all the safety tools we can get.

(b) Relevance of statistics for passenger and trespasser fatalities from accidents.

I cannot answer for IPAC on the use of accident statistics in IPAC's study. However, our interpretation of the statistics presented by IPAC in its study is that they are useful and relevant figures.

By showing that passenger fatalities occurred in railroads at a rate-per-passenger-mile almost double the rate for airline passenger fatalities in the year 1982-1984, and by showing that more than 77,000 passengers, trespassers, and other non-employees were injured or killed by railroads from 1976-1985, the IPAC study has helped show the extent to which railroads are a hazardous industry and that railroad safety is a topic worthy of public concern.

These statistics do have a relevance to FELA. While injured passengers, trespassers and victims of gate crossing collisions-employees can simultaneously injure employees. The employees injured in these accidents are covered by FELA. Furthermore, the safety incentive FELA imposes on railroads benefits passengers and other members of the public in addition to employees. By encouraging conditions to prevent accidents that cause employee injuries, FELA simultaneously helps prevent accidents involving passengers and other non-employees.

(c) Questions related to safety statistics.

The following points are made in response to the third and fourth subpoints in Senator Kasten's question #2.

o Analysis of FRA statistics related to injury rates shows clearly that serious safety problems continue to exist in the railroad industry. Looking only at accident numbers can be misleading for at least three reasons. First, both accidents and incidents should be measured. The only difference between accidents and incidents is that the latter is used to describe situations in which a lower dollar value of property damage has occurred. Even though damages to railroads' capital stock is less in "incidents", they account for a high proportion of injuries to rail workers. Second, in order to measure human safety conditions it is necessary to examine statistics for personal injury accidents and incidents as well as for train accidents and incidents. Third, and perhaps most important, safety-related figures should be evaluated in terms of incident rates rather just than in terms of reported numbers. In recent years the railroad industry has shrunk dramatically in track miles, number of employees and man-hours worked. Because of this shrinkage, reductions in accident/incidents or injuries do not indicate improved safety conditions unless they are accompanied by comparable reductions in the incident rates.

We have analyzed statistics from the U.S. Department of Transportation Accident/Incident Bulletins for the years 1980-1985 to compare injuries with man-hours worked. We have found that the industry has been able to claim that it is less dangerous primarily because there is less of an industry. Between 1980-1985, the numbers of reported injuries decreased 40%. But the total number of man-hours worked also decreased 34%. When measured as an incident rate, the injury record was not impressive. Injuries per man-hour were reduced by only 9.7%. Worse, the fatality rates for some of the more dangerous categories of railroad work stayed the same or increased. Maintenance of equipment workers (category 400), for example worked 44.4% fewer hours in 1985, but suffered work-related deaths at a frequency rate 27.8% higher than in 1980. Maintenance of way workers (category 300) worked 27% fewer hours,

but were killed on the job at the same rate as in 1980. (See Attachment, "Accident/Incident Statistics".)

In other words, while miles of trackage, number of employees and manhours worked have all shown large decreases, the rate at which employees are injured has dropped far less significantly, and the severity of injuries (as measured by fatality rates) has worsened or remain unchanged for some categories of railroad workers.

o It is not accurate to say that FRA has no jurisdiction over human factor accidents. One of the primary means of avoiding human error accidents is through proper training. FRA has authority to establish training standards and requirements. However, few of the training recommendations made for many years by the National Transportation Safety Board and by railway labor have been adopted by the FRA.

o The category of accidents labeled "human factor" raises an important point regarding accident reporting in the railroad industry. Until the recent Rail Safety Act amendment, railroads have had exclusive authority for classifying accidents and incidents and for reporting them to the FRA. The FRA simply compiles information given by the companies. It is in the companies' interests to classify accidents/incidents as having been caused by human factors and to minimize reporting. We expect that a thorough study would show that accident and incident reporting by the companies has been inaccurate and understated in this regard and in other ways.

o To whatever extent accidents and injuries are caused by factors beyond the jurisdiction of FRA, the value of FELA is further demonstrated. Since FELA applies to all aspects of the railroad industry, the safety incentive it imposes helps fill in the gaps in safety regulations.

3. "Shouldn't an injured worker receive SOME compensation regardless of the allocation of fault for the injury...?

There appears to be a widely held misconception that significant numbers of injured railroad workers are left with no compensation because FELA awards are based upon findings of fault. This is not the case, for two reasons. The first reason relates to injury compensation provisions under the railroad retirement system, and the second relates to FELA's structure as a comparative negligence statute. Please see the response to Senator Exon's question #2 for a full explanation.

4. Regarding states permitting tort remedies over and above worker compensation.

The point I made in my testimony was that injured workers in an increasing number of states are being allowed to use tort law remedies for recovery from their employers, in specific types of cases, as a supplement to their no-fault worker compensation remedies. This does not mean that no-fault worker compensation is being replaced by fault-based systems; rather it means the inadequacies of no-fault worker compensation are resulting in tort remedies being layered on top of the no-fault systems. That such a development should occur clearly indicates the shortcomings of the state worker compensation programs. The attached article from the Cincinnati Law Review, submitted as Appendix II, explains that "Recent judicial exceptions to the exclusive remedy afforded by workers' compensation statutes illustrate dissatisfaction with the system as originally bargained." To the extent injured general-industry workers increasingly have tort remedies against their employers available to them, in addition to worker compensation, their total compensation coverage is moving in the direction of FELA.

I am pleased to provide further information about the Coalition for Safe & Responsible Railroads, of which I am co-chairman. Most of the questions asked at the hearing by Senators Kasten and Pressler pertained not to the Coalition, but to two of its members -- the Illinois Public Action Council and the Campaign for Safe Railroads. Immediately following the hearing I asked both of those organizations to respond directly to the Subcommittee, to answer all questions that had been asked about their organizations which I could not answer. I know that both organizations have responded to the Subcommittee, and I trust their responses addressed the questions satisfactorily. The following addresses additional questions that have been directed to me about the Coalition.

Regarding the adoption of Coalition policies

The Coalition operates within the bounds of the organization's statement of purpose, which reads as follows: "The Coalition for Safe & Responsible Railroads provides a voice and information clearinghouse for organizations concerned with rail safety, including organizations representing consumers, railroad workers, environmental interests, local government, or other public interests. In order to promote railroad safety, the Coalition supports a strengthened federal safety regulatory program for the railroad industry including strengthened control of hazardous materials transportation, and the maintenance of the Federal Employers' Liability Act (FELA) as a means of assuring accountability for railroad safety." All organizations belonging to the Coalition know this is the guiding policy statement, and that the Coalition conducts activities within the scope of the statement.

Regarding Coalition membership funding and participation

The membership list on page 13 of Coalition's testimony is complete, but with one clarification to be made. We discovered after the hearing that some of the distributed copies of the testimony contained a typographic error on page 13 which resulted in two organizations -- "Campaign for Safe Railroads" and "Citizens Action" -- being printed on the same line, apparently leading to some confusion and to the assumption by readers that the combined name represents one organization. One of the questions submitted by Senator Kasten reflects this error in our printing, and asks about the "Campaign for Safe Railroads Citizens Action." They are two distinct organizations, and to our knowledge there is no connection between the Campaign for

Safe Railroads and Citizens Action. We apologize for the error, and regret any confusion it caused.

No law firms are members of, participants in, or funders of the Coalition. One of the members of the Coalition, the Campaign for Safe Railroads, is a national organization of law firms that practice, in part, in the field of personal injury law, including FELA. (As indicated on page one of my testimony on behalf of the Coalition, members of the Coalition includes "representatives of personal injury attorneys" -- which is a reference to the Campaign for Safe Railroads.) The co-chairman of the Campaign for Safe Railroads, Robert Brobyn, has severed along with me as initial co-chair of the Coalition. Regarding funding of the Illinois Public Action Council Study, I refer you to the information submitted to the Subcommittee by the Illinois Public Action Council and the Campaign for Safe Railroads. I have no further information.

As for the authorship of the Illinois Public Action Council study, I do know that the project was headed by the Executive Director of the Illinois Public Action Council. I do not know who on his staff worked on in the study.

With respect to support for the Coalition by its members, varying types of support have been given, reflecting the varying abilities of the members. The public interest organizations that are members do not have the resources to provide financial support, but they have given other types of support by participating in the exchange of information, making available their information-distribution networks, and supplying any relevant publications of their own. The railway labor organizations have done the same, as well as made in-kind staff support available for helping obtain and develop technical information. In addition, as I indicated at the hearing, my own union, and perhaps others, are preparing to contribute to the Coalition to support the development of a railroad safety data base. The Campaign for Safe Railroads has provided financial support to enable a public relations firm in Washington to be retained to administer the Coalition. This support has totalled approximately $100,000 over the course of the one and a half years since the Coalition was formed. (No law firms or lawyers have made any contributions to the Coalition. All participation of legal interests has been through the Campaign for Safe Railroads.) All of these forms of membership support have enabled the Coalition to carry out its stated purpose of developing information on railroad safety and FELA, disseminating the information among the interested groups, and providing information to Congress and the public.

Regarding political contributions

The Coalition does not make any political contributions.

Appendix I

Accident/Incident Statistics

for Categories of Railroad Employees

Referenced in Response to Senator Kasten's Question #2

Maintenance of Way (Category 300)

Year	Injuries	Injuries Per 10^6 Man Hours	Deaths Per 10^8 Man Hours	Killed	Total Hrs. Wrk.
1985	9,935	79.3	12.8	16	125,229,264
1984	11,646	86.1	10.4	14	135,223,879
1983	10,371	89.5	19.8	23	115,941,532
1982	12,134	84.5	18.8	27	143,676,130
1981	14,137	85.0	8.4	14	166,403,287
1980	16,006	93.3	12.8	22	171,566,314
% change 1980-85	-37.9%	-15%	0%	-27.3%	-27%

Maintenance of Equipment & Stores (Category 400)

Year	Injuries	Injuries Per 10^6 Man Hours	Deaths Per 10^8 Man Hours	Killed	Total Hrs. Wrk.
1985	7,045	64.9	4.6	5	108,632,754
1984	7,693	64.0	6.7	8	120,185,641
1983	6,714	66.0	6.8	7	101,755,894
1982	8,785	61.4	5.6	8	142,976,907
1981	12,014	66.2	3.3	6	181,384,661
1980	14,080	72.0	3.6	7	195,498,162
% change 1980-85	-50%	-10%	+27.8%	-28.6%	-44.4%

All Categories (100 - 700)

Year	Injuries	Injuries Per 10^6 Man Hours	Deaths Per 10^8 Man Hours	Killed	Total Hrs. Wrk.
1985	29,358	46.6	7.3	46	630,613,207
1984	32,812	48.1	8.7	59	681,639,224
1983	29,761	49.2	10.1	61	604,851,694
1982	35,146	45.8	10.2	78	766,616,037
1981	42,294	46.8	6.3	57	903,683,597
1980	49,348	51.6	9.3	89	956,968,709
% change 1980-85	-40.5%	-9.7%	-21.5%	-48.3%	-34.1%

Source: U.S. Department of Transportation, "Accident/Incident Bulletins"

Senator EXON. Thank you very much, Mr. Zeh.

Now we will hear from Mr. Hardin. Mr. Hardin, welcome.

STATEMENT OF FRED A. HARDIN, PRESIDENT, UNITED TRANSPORTATION UNION

Mr. HARDIN. Thank you.

Mr. Chairman, I appreciate the opportunity to be here, and honorable members. First of all, with your permission I would like to make two comments.

First, I want to apologize to my good friend Graham Claytor. I came off Southern Railroad and I have known him for about 30 years, and I want to apologize to him about the rumor about him retiring.

I have heard it several times. I understand that John Riley started it. I did not.

And then I would like to make one other comment about Mr. Claytor. The question has been raised here today about attorney's fees, and I was a union officer on Southern Railroad. Mr. Brosnan was president. We had a lot of strikes and legal actions going just on a weekly basis.

And all of a sudden, in walked a new attorney, Graham Claytor, and he clobbered us for months and months in court. So one day I said to my friend Mr. Brosnan, the president: I declare, you brought in a good lawyer. He said: Yes, but is he expensive.

So I want to compliment him. He is a very capable attorney, and he has been a friend of mine for a long time.

I am not going to read anything. My statement is already in here, and has been criticized, which is all right. But I would like to point out a couple of things.

I am glad he is not retiring because it has always been my opinion that you do not get smart until about 65 or 66.

I would like to point out a couple of differences here in my experience and those of others. Workman's comp does pay any worker, regardless of what caused his accident. So you can have ten workers that worked unsafely and were injured and they are going to get exactly the same benefit from the workman's comp that a worker who did not have anything to do with his injury, his employer caused his injury.

That is not fair to a safe worker. And the fact that they can work unsafely and be paid is not an incentive to responsibility and working safely.

Now, it has been brought out that many FELA cases go to court and they end up with a zero verdict. That is true, some of them. I do not think the 22 percent that Mr. Riley mentioned, I do not think that is accurate. But after all, he is the professional testifier, so you know, you have to listen.

But we are perfectly satisfied and the railroad employees are satisfied. If the railroad can prove that we caused the accident ourselves, we were negligent, then I do not think the railroad owes us anything.

But this thing, we have been arguing about it for years and years and years. The railroads would certainly like to—they approached us many, many times. They would like to have a catalogue of just

meat prices: one leg off at the hip, $300,000; two legs, 425. And the first question I raise, the second leg is a bargain.

But that is not the American way. The jury system has stood the test of time. And if a railroad employee is willing to prove his case, if the railroad caused his accident, then I think it is something that we should be able to keep.

And it is certainly not fair to put us on a test program for Amtrak. Now, Mr. Claytor has pointed out that the cost for FELA reverts to the taxpayer. I do not agree with him on that, because several years ago Amtrak took over the corridor, he called us all in and said that he had to have huge wage concessions because Amtrak—the revenue had to take care of 50 percent of the cost.

We gave him a $200 million concession in wage cuts, deferrals and wage rules. Now I notice that in Mr. Claytor's testimony, that revenue takes care of over 67 percent of all costs.

So I think we have more than done our part. And I think we could well say that any FELA costs should just be charged up to the employees' concessions, rather than to the taxpayers' part.

But it is a very serious thing, and I want to criticize Amtrak on one more point, and I think it is pertinent—85 percent of all FELA cases throughout the rail industry are settled without an attorney; 1.1 percent are settled in a court before a jury.

I notice in Amtrak in the last five years they have had 271 cases; 248 of them were handled by attorneys. Now, the testimony does not show how many of them went to court, but I would presume it would be a large amount.

That shows one thing, that Amtrak takes a very, very hard line and does not settle these cases with the employees. So it must be a sort of an adversarial thing on Amtrak. But we are certainly interested in Amtrak's future—Mr. Claytor has done a wonderful job in building up Amtrak.

It is a badly needed and wonderfully operated passenger transportation system, and no country can have a transportation passenger system without government subsidy. That has been proven all over the world.

But we do not think that it is fair to the employees—and of course, I knew I was going to get criticized. It is sort of ironic that in the same legislation we are to be put under workman's compensation and also take the cap off executive salaries.

It is just coincidental, but nevertheless it is in the same program.

And I was criticized slightly, I guess, about taking us out of railroad retirement, and that is not before this committee. I apologize for that. But if you look at Mr. Claytor's testimony, you will see that he is advocating random testing in his testimony. That is also before another committee, so we are equal on that. We are both trespassing.

And I do want to make one other comment. There have been some questions, and I will be glad to answer any questions about the union's participation or attorney costs or affiliations or anything.

We have nothing to hide. I am glad to answer any questions.

Thank you.

[The statement and questions and answers follow:]

STATEMENT OF FRED A. HARDIN, PRESIDENT, UNITED TRANSPORTATION UNION

My name is Fred A. Hardin, and I am International President of the United Transportation Union, which represents most of the operating employees, namely: conductors, trainment, yardmen, firemen, hostlers, yardmasters and some locomotive engineers on the American and Canadian railroads. Our members perform the railroad services of switching cars, making our trains and handling trains over the road. They are in the most dangerous vocation insofar as fatalities and personal injuries are concerned.

More than 80 years ago, Congress realized the danger of railroad operations and passed into law the Federal Employers' Liability Act.

One of the primary reasons for the enactment of that legislation was the fact that railroads operate in interstate commerce and railroad employees working for the same carrier providing identical service often times are working in two or more states during their tour of duty. The same situation still exists and any attempt to put railroads under various state workmen's compensation laws would not only necessitate changes in those laws, but would create an implacable position for the employees working in two or more states during their tour of duty. The need for federal regulations still exists today.

In the early part of this century, railroading was extremely dangerous due to the light rail, link and pin couplings and fragile equipment. Railroading is just as dangerous today due to extremely heavy locomotives, huge cars, high speed and the ever increasing handling of hazardous and superhazardous material. We are very much disturbed and frustrated at the carriers' attempt to wipe out FELA and abolish the employees' right to have their case heard before a jury of their peers, all for the sake of a few more dollars profit for the railroads. There have been instances where railroad employees, or their widows, have received liberal judgment from bona fide juries in cases of total or permanent disability and fatalities. However, who among us would sell both legs off at the hips for a million dollars? And what is a million dollars to an employee who is killed or permanently injured with 30 or 40 years of expectancy in his vocation?

The most frustrating and disappointing aspect of this proposed legislation is that Graham Claytor, President of Amtrak, and a nationally known proponent of rail service, would let himself be used as a stalking horse for the giant freight rail systems who have no compassion or interest in pain or suffering or the future lives of their employees. The unions, including the UTU, made great wage and rule concessions to Mr. Claytor in an effort to make Amtrak the great and valuable passenger rail service that it now has become. Now that we have cooperated with President Claytor in every way possible, it is very difficult to comprehend how he, in the last months of an illustrious rail executive career, would propose that the employees of Amtrak not be covered under the provisions of FELA and the Railroad Retirement System.

It is our understanding that in this same legislation, the many, many executive officers of Amtrak are asking for huge salary increases and apparently would pay for these by depriving the employees of FELA and Railroad Retirement protection and benefits, both of which were passed by Congress and have stood the test of time as being necessary, fair and equitable.

We also note that Federal Railroad Administrator John Riley is taking an active part in supporting this totally unfair and discriminatory legislation. Many reports are being circulated, apparently with merit, that President Claytor will soon retire from Amtrak and John Riley is seeking that position. If those reports are accurate, Administrator Riley should not participate in any legislation or activities whatsoever that involve railroads or legislation that involves railroad employees or collective bargaining agreements.

We respectfully request that this responsible Subcommittee consider this proposed legislation and then discard it as being discriminatory and completely inconsistent with previous actions of our democratic Congress.

QUESTIONS OF SENATOR EXON AND THE ANSWERS THERETO

Could you explain the UTU designated counsel concept.

The UTU was formed in 1969 through the merger of four then existing unions representing railroad operating employees. The Brotherhood of Railroad Trainmen, one of those four previous organizations, had for many, many years a designated legal counsel concept (the Switchmen's Union of North America also had a similar concept). The UTU adopted the BRT concept and briefly it is as follows:

We appoint designated legal counsel in various sections of the country and list them in our union Directory which is furnished to each officer and each local (Page 72 of attached current Directory). These attorneys are selected for legal efficiency, integrity, ability and expertise in the field. For the most part, these attorneys have been our designated counsel for many, many years, or are partners who succeed to the designation upon the death or retirement of the former designated counsel. We have dozens of requests by attorneys asking to be appointed but we have been very, very meticulous and our designated counsel have been maintained as described hereinabove.

The UTU International has no participation whatsoever in the contracting or handling of any personal injury case on the part of a railroad employee. In fact, we at the International never even know of a personal injury unless there is a member or local lodge officer who might tell us of such injury. We do not screen cases, investigate cases, or participate in anyway whatsoever.

If an injured member decides that he needs legal counsel he can either look up a counsel in the union Directory or ask a local union officer who the union has designated in his or her area. There are dozens and even hundreds of attorneys specializing in injury cases throughout the country who spend large sums of money advertising, even in newspapers and on TV, seeking both FELA and Workmen's Compensation cases. None of the UTU designated counsel have ever participated in any such advertising and if they do so they would be immediately removed from the designated list. None of these attorneys contribute any monies whatsoever to the union either at the local level or at the International level. Many of them make political contributions through our voluntary TPEL fund or through their local political affiliations (both Democrat and Republican), and several of these are involved in state political activities.

These designated counsel establish their own contingency fees, which I understand is 25% of the judgment if the case has to be tried. In many instances they give free advice and often times help the employee settle his or her case with the carrier at no charge. Oftentimes the designated legal counsel will provide minor legal services for members, retirees or widows concerning wills, taxes, or retirement questions at no cost.

The International sometimes uses one of the designated counsel as local counsel to handle a minor legal matter in their area such as fair representation. an equity dispute, lawsuit or other matters, and in most cases they charge the International a reasonable fee on an hourly basis.

We have been very careful in not involving the union in any FELA lawsuits whatsoever and not allowing the legal counsel to play any part in the operation of the union.

We sincerely feel as a union our members should have knowledge of honest, capable attorneys in their area. Many members of Congress, both past and present, have participated in UTU or former BRT FELA cases, and I am sure they will vouch for the integrity and honesty of our designated legal counsel concept.

QUESTIONS OF SENATOR KASTEN AND THE ANSWERS THERETO

In your response to questions at the hearing, you mentioned the concept of "UTU-designated counsel." Could you explain this concept?

- **What fee guidelines does the UTU establish for these attorneys?**

- **Please provide a list of the UTU designated cousel.**

You indicated that you were familiar with Mssrs. John Blount and J. Edward Dvorak, III, authors of the book "Justice for the Injured Railroad Worker (And How To Achieve It)". Please provide the background of these gentlemen.

John Blount

Date of Birth October 12, 1934.

Admitted to Membership Brotherhood of Railroad Trainmen July 1, 1962.

Suspended from Membership June 1, 1977 for nonpayment of dues.

Blount was delegate from Local 1596 to the first UTU convention in 1971. He ran for the office of President (results attached). He also served as local chairman.

On information and belief I understand most of Blount's work as an investigator was for an attorney in Chicago named John C. Sands. We declined to appoint Mr. Sands as designated counsel and understand that he does a lot of work in many industries.

While he did serve as a delegate to our 1975 convention, it seems his activity in the UTU became less and less and in 1977 he was suspended from membership.

To my knowledge at no time was he ever associated with any of our UTU legal counsel.

J. Edward Dvorak

Date of Birth: January 16, 1941

Admitted to membership Brotherhood of Railroad Trainmen February 1, 1969 and is still a member of the UTU.

Is employed by Soo Line Railroad.

Served as delegate Local 1577 to our 1983 Convention.

Dvorak is a dissident type who has always been a prolific writer. Prior to being the co-author of "Justice for the Injured Railroad Worker," he was editor of a publication called "Railroadworkers Fightback Newsletter," (sample copy attached), which for the most part was a critical assessment of any program undertaken by the International, our general chairpersons or our state legislative people. He periodically published this newsletter and received a subscription fee from those who were interested in his philosophy and criticism of bona fide union representation.

His career included election to minor union offices, and I think for a short period of time he was a trainmaster (subordinate carrier officer) then apparently dedicated his talents to some personal injury non designated counsel.

To my knowledge at no time was he ever associated with any of our UTU legal counsel.

Senator EXON. Gentlemen, thank you both very much. We have some questions that we will submit to you for the record and ask that you respond as promptly as you can.

Let me cover one or two points that have been brought up time and time again. In the testimony that we have received to date, gentlemen, including that by Mr. Dempsey, the claim is that FELA has a negative impact on workplace safety, because employees may be forced to slant their accounts of the particular accident in order to prove that the employer was negligent.

The claim goes further, in that this may impede the proper investigation of accidents. What is your view of this issue, either one of you or both?

Mr. HARDIN. Well, I represent almost all of the operating employees and I think it is just directly the opposite. If a man knows that he is going to—that if he is injured he has got to prove that the railroad was negligent, he is going to be a more safe working employee.

But if he knows that he can have an injury and get paid under workman's comp, he would not pay any attention to safety rules.

Mr. Claytor made another point. I was there. He said that when he became President of Southern they were right at the bottom of the heap in safety, and in seven years they won the Harriman Award.

That is absolutely true. He put an employee cooperative things in, and he mentioned the Harriman Award. And I do not know whether you all are familiar with that, but it is sort of a World Series in the railroad industry. It is a huge award that is given to the railroad each year who has the best safety record.

And it has caused a lot of problems. Under Government rules, the railroad has to report an accident if the employee is off more than three days, and I think it is ten days now, whatever it is.

And this has caused the railroads—they want to win the Harriman Award so bad that they will have an employee with a broken leg and, instead of reporting it, they just pay him to come on down to the depot and sit around.

We had one example, Mr. Chairman, where the railroad was so interested in winning the Harriman Award, they had a man with a broken leg and they told him to come on down to the depot with his cast and they would pay him, so they would not have to report an injury. He fell and broke his other leg.

So the Harriman Award has caused a lot of problems in safety operation of railroads. But it is a lucrative award.

Mr. ZEH. Mr. Chairman, I wonder if I could comment on your question. There has been some reference to the safety legislation that has passed the Congress recently.

I have had two particular experiences with that legislation, and specifically provisions that relate to the Brotherhood of Maintenance of Way Employees, one pertaining to bridge safety, the other pertaining to safe living accommodations for our members who have to live away from home.

We believe that economics very often has an impact on safety considerations insofar as the railroads are concerned.

On the House side, Mr. Claytor voiced his opposition to the bridge safety provisions of the safety bill because of the costs that

Amtrak would incur if those provisions were to pass, and those are purely safety-related.

The same with our camp cars. With the other railroads we discussed camp car safety standards, health and sanitary conditions. Some of this is not even safety; it is just bare livability.

And the first thing the railroads alluded to is that it would be too expensive to do this, cost prohibitive. So I do submit and feel strongly that economics unfortunately do enter into safety considerations when railroads are confronted with policy decisions that affect safety in the workplace.

Thank you.

Senator EXON. One last question. Some proponents of the Amtrak three-year pilot program argue that FELA compensation discourages rehabilitation by requiring workers to prove pain and suffering and by paying them for the number of days of work that they have missed.

How do you respond to this claim?

Mr. ZEH. I think, Mr. Chairman, at least experience indicates that most of the major railroads have personnel assigned to engage in rehabilitative efforts. And so they do have resources intended to accomplish rehabilitation, and I think that is something that we all attempt to address.

Senator EXON. Mr. Hardin, do you have anything to add?

Mr. HARDIN. I would agree with that. I think most of the railroads have rehabilitation programs for minor or medium injuries.

But most railroads today in any case that goes to litigation under FELA and the employee says he is permanently and totally disabled, they require him to sever his seniority as part of the settlement. So there is no rehabilitation.

And certainly Mr. Claytor in his testimony mentioned about miraculous recoveries. You know, a man totally and permanently disabled, and three months later he wants to come back to work.

Well, you know, they do go to Lourdes and all. We are sure of that. But nevertheless, in major cases they force them to sever the relationship. But we do have good rehabilitation programs.

Senator EXON. Mr. Hardin, thank you for coming here today. I have a 4:30 appointment that I must keep, and my friend and colleague from Wisconsin has a question or two, and possibly my colleague from South Dakota.

I thank you for being here with us today and for your very valuable testimony.

Mr. HARDIN. We appreciate the opportunity.

Senator PRESSLER. Mr. Hardin, I have no bone to pick with you. You are a union president and you represent yourself very frankly as that. You do not pretent to be anything else.

And we have disagreements, but I don't have any bones to pick with you. So I may have a question or two for the record.

Mr. Zeh, I would like to ask you some questions about one of your members, the so-called Illinois Public Action Council. It seems to call itself by different names in different places. Why is that?

Mr. ZEH. I cannot answer that, Senator. I am familiar with the Illinois Public Action Council as a member of the Coalition for Safe and Responsible Railroads.

Senator PRESSLER. But you are here today, at least I see it as attached, that you are speaking on their behalf, are you not?

Mr. ZEH. No, I am speaking on behalf of the Coalition for Safe and Responsible Railroads. The organization you are speaking of is a member of that organization.

Senator PRESSLER. Well, could you find out for the record why they call themselves different names in different places?

For example, they call themselves one name in Illinois, they call themselves another name in Wisconsin. Indeed, in Rapid City, South Dakota, they call themselves something, and our people had told some of the local press about them, and by the time they reached Sioux Falls they called themselves another name.

And I do not mind people having different names, but I think they are up to misrepresentation. And I do not think that they do you justice.

But could you find out for the record why they use different names at different press conferences?

Mr. ZEH. I will certainly endeavor to find that out for you, Senator.

Senator PRESSLER. Also, I have here an article from the National Journal talking about the FEC, the Federal Election Commission. Now, the FEC is a pretty benign group. You really have to be a bank robber to get fined $500 or $1,000.

Recently the FEC fined the Illinois Public Action Council $5,000. Do you know why that was?

Mr. ZEH. No, I am sorry, I do not, Senator.

Senator PRESSLER. Would you submit it for the record?

Mr. ZEH. I certainly will.

Senator PRESSLER. I think the reason was, as I gather from this, that they were misrepresenting themselves in the type of contributions that they were making.

Now, on the study that this group spreads around, which their own people say the attorneys paid $50,000 toward, would you say that is a case of misrepresentation?

Mr. ZEH. As far as I know, the research work and effort that went into preparing that study was done by the Illinois Public Action Council. I believe it was funded with aid from some FELA attorneys.

Senator PRESSLER. That is right, but that was dug out by a journalist. They put it forth as some kind of a public citizen study, and we now have that information of who really paid for it.

The point I am making is that one of the groups you are sitting here representing really engages in misrepresentation in my judgment, and I like to play it straight. If I do not agree with you, I will tell you so. I will tell you who I am and so forth.

But I would really like you to submit answers to a series of questions about them. They are one of your members. On page 13 of your testimony, you list these people whom you represent and they are one of them. And you do not seem to know very much about them.

Mr. ZEH. As far as the organizational structure is concerned, that is absolutely correct, Senator.

Senator PRESSLER. Are you aware that they go around and hold press conferences?

Mr. ZEH. Yes, I am.

Senator PRESSLER. Do you participate in those sometimes?

Mr. ZEH. I have not participated in any. No, I have not.[1]

Senator PRESSLER. How are those press conferences financed?

Mr. ZEH. I honestly do not know.

Senator PRESSLER. You are aware that they hold them? They are one of the groups that you are here testifying—you seem to know very little about them.

Mr. ZEH. Well, I do know that they have prepared a report which you alluded to earlier.

Senator PRESSLER. I would like you to submit some answers to some questions that I have about them. But I think that this is the kind of thing that sets back causes as much as it sets them forward.

I hope that your groups and your associates will call themselves what they are. You are appearing here on behalf of this group, apparently. You list them on page 13. This is your testimony that I have here, is that right?

Mr. ZEH. That is correct.

Senator PRESSLER. And you know almost nothing about this Illinois Public Action Council that you list as one of your members?

Mr. ZEH. That is correct.

Senator PRESSLER. Have you ever met them?

Mr. ZEH. Yes, I know Mr. Creamer and I was involved with the report. I probably am more familiar with the work on the report than any other facet of the Illinois Public Action Council.

Senator PRESSLER. How big a group is this?

Mr. ZEH. Again, I do not know.

Senator PRESSLER. How many of them have you seen?

Mr. ZEH. I have met Mr. Creamer and I have worked with him before.

Senator PRESSLER. How many other members of this group have you met?

Mr. ZEH. I do not believe I have met with anybody else other than Mr. Creamer.

Senator PRESSLER. Is it possible that he is the only member?

Mr. ZEH. I do not believe so.

Senator PRESSLER. Can you find out who the other people involved are?

Mr. ZEH. I certainly will endeavor to do that.

Senator PRESSLER. Because I cannot seem to find anybody who knows anybody else other than Mr. Creamer in this group. They are one of your—you are testifying here on behalf of them. You have listed them as a member of CRSS, and you are not sure if they only have one person in their group?

Mr. ZEH. I am testifying on behalf of the Coalition for Safe and Responsible Railroads. It is one member. I am not testifying on its behalf.

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[1] The witness would like to add the following correction: "I did participate in an IPAC press conference in Miami in February 1988, which was held in conjunction with a meeting of the RLEA. In addition, a statement on my behalf was released in a Detroit press conference, where the BMWE headquarters is located, but I did not participate personally."

Senator PRESSLER. But if somebody joins your association, you do not know anything about them? You met one person from there?

Mr. ZEH. As I said, we were involved with the preparation of the report dealing with safety in the workplace and safety in the railroad industry.

Senator PRESSLER. Would you submit to this committee a description of them, how many members they have got, and what they do, and where they are located?

Mr. ZEH. Certainly.

Senator PRESSLER. And why this one person who goes around tends to use a different name for his group in different cities?

Mr. ZEH. I have to assume that your characterization is accurate. I will attempt to find out the answer to your question either myself or have Mr. Creamer respond directly.

Senator PRESSLER. Well, this is a very mysterious thing to me. You are sitting here before the committee and you listed them as one of your four members, and it is very mysterious to me that you do not know anything about them.

Mr. ZEH. Well, for example, we have the Consumer Federation of America, which is a very large consumer-oriented organization. While we have some involvement, we also are a member of that group.

Senator PRESSLER. Yes, I know about them. I mean, I am well familiar with them. I have heard of them before.

But this Illinois Public Action Council I am very, very curious to learn more about. You list that as a co-equal with the Consumer Federation of America, and you have four of them. The Illinois Public Action Council.

Mr. ZEH. I can say that I am more familiar with the CFA than I am with the Illinois Public Action Council. And as I mentioned, I will endeavor to furnish you with the definitive information that you have asked for.

Senator PRESSLER. Do you think it is a fair question for a Senator to ask a witness who appears, who lists a group, just exactly who they are? Is that a fair question for a Congressional committee?

Mr. ZEH. Surely.

I might say also, that I am appearing on behalf of a number of railroad unions. While I am more familiar with my own than with others, there are many facets in many of the unions I am representing and speaking on behalf of today that I am not intimately familiar with.

Senator PRESSLER. But those unions, I know about them and I think we all do. I just want to know, give me some information on the Illinois Public Action Council, what its $5,000 fine was here for some kind of a misrepresentation, who are its members, why it uses different names in different parts of the country?

And if this is the type of tactic that you have to resort to to advocate your cause, you have a serious problem in my judgment.

Mr. ZEH. I will be happy to provide that information, Senator.

Senator PRESSLER. Thank you.

Senator KASTEN. Mr. Zeh, how much did this study cost?

Mr. ZEH. It is my understanding from listening to Senator Pressler and from the information I had before, that it was in the neighborhood of $50,000.

Senator KASTEN. Was all of that paid for by the trial lawyers?

Mr. ZEH. I believe, if not all of it, a majority of it.

Senator KASTEN. Was paid for by a trial lawyers association or individual trial lawyers? For example, was there one—you said you believed it was paid for by a FELA law firm, if I understood what you said.

Was this a particular law firm or a group of law firms in Illinois? And is that why they call themselves the Illinois Public Action Council?

Mr. ZEH. It was paid for by a number of FELA law firms.

Senator KASTEN. Do you know one of the names of one of those law firms?

Mr. ZEH. Yes.

Senator KASTEN. What is it?

Mr. ZEH. One would be Brobyn and Forceno.

Senator KASTEN. Is that Chicago or Washington?

Mr. ZEH. It would be in Philadelphia.

Senator KASTEN. It is a Philadelphia firm?

Mr. ZEH. Yes.

Senator KASTEN. What is the connection, then, between the Philadelphia law firm and the Illinois Public Action Council and this guy Creamer? Is Creamer associated with the Philadelphia law firm?

Mr. ZEH. Senator, I know Mr. Creamer was involved in the research, and at some point prior to my becoming involved in the research project you are alluding to in the report, a group of FELA attorneys worked with Mr. Creamer to engage in the study.

That happened prior to my becoming involved with the Coalition.

Senator KASTEN. Is Mr. Creamer or is Mr. Cameron in the audience? Are they with you today?

Mr. ZEH. Not to my knowledge.

Senator PRESSLER. Are they here?

Mr. ZEH. I do not believe they are, Senator.

Senator KASTEN. Now, Mr. Cameron of Citizen Action in Chicago, not of the Illinois Public Action Council, is the one that said to Senator Pressler's reporter from the Rapid City Journal that a group of FELA attorneys had paid for most of the $50,000 cost of the study.

Now, who is Mr. Cameron? You said you only know Mr. Creamer. Do you know Mr. Cameron, Mr. John Cameron of Citizen Action in Chicago?

Mr. ZEH. No, I do not, Senator.

Senator KASTEN. How would he know about the FELA attorneys, particularly if the FELA attorneys are in Philadephia?

Mr. ZEH. I would assume that he probably spoke with Mr. Creamer.

Senator KASTEN. Could you provide—are there others of these? Is the activity of the law firm solely involved in this study, or are there other activities that the law firm has taken part in on behalf of either Citizen Action or the Illinois Public Action Council?

Mr. ZEH. The only activities I am familiar with is in conjunction with the Illinois Public Action Council.

Senator KASTEN. And what, if anything, do all of these people have to do with the Wisconsin Action Coalition?

Mr. ZEH. I honestly do not know, Senator.

Senator KASTEN. When they came to Wisconsin they were calling themselves the Wisconsin Action Coalition, along with the Illinois Public Action Council and other groups. But the person that was speaking for them was Mr. Robert Kramer, who is the one from Illinois.

Now, do you know anything about the press conferences that took place in Wisconsin?

Mr. ZEH. No, I do not, other than what I have heard this afternoon, Senator.

Senator KASTEN. Would you provide us with a list of the FELA law firms that contributed? Did they make their contributions to Citizen Action? Did the law firms make their contributions to Illinois Public Action Council, or did the law firm make their contribution to your railroad group, the Coalition for Safe Railroads?

Who are the checks being made out to?

Mr. ZEH. I believe the report was prepared for the Illinois Public Action Council and funded principally by FELA counsel.

Senator KASTEN. So the check went from the Philadelphia FELA lawyers to the Illinois Public Action Council, is that what you think?

Mr. ZEH. I believe so.

Senator KASTEN. And would there be other law firms as well that would have participated, or is there one main law firm that paid for the study?

Mr. ZEH. No, I believe there were a number of firms.

Senator KASTEN. Could you provide—obviously, you do not know all the answers to these questions, and neither do we. But I think it is important to find out, number one, who paid for the study, whether it was your Coalition, Citizen Action, or the Illinois Public Action Council.

In other words, under whose auspices it was, and then who paid for them to do the work, including the one Philadelphia FELA law firm. But it is also important to figure out who was paying for, for example, the transportation from one city in Wisconsin to another to another, when they are going.

They were using—they were calling themselves in Wisconsin your Coalition, the one that you're representing here today, the Coalition for Safe and Responsible Railroads.

That is what they said they were in Wisconsin, until someone asked them what they had to do with the Illinois Public Action Council, and then they said: Well, we are really Illinois Public Action Council; we are not Coalition for Safe and Responsible Railroads.

So we want to find out who is paying, not only for the study, but also who is paying to transport this group of people with changing names from Chicago to Milwaukee to Green Bay to Rapid City, to wherever else they are going.

And we only know that they have been in Wisconsin and in South Dakota.

But could you provide us, first of all, with the names of the law firms that have funded this study? And secondly, if it is the law firms that also provided the transportation of this group, could you

provide us how much in addition to the $50,000 are they paying for transportation costs?

Or if the law firms are not paying for the transportation costs, if you could provide us with some information on who did pay for the transportation costs on this various group of meetings, that would be helpful.

Mr. ZEH. Yes, to the extent that I can I certainly will, Senator.

Senator PRESSLER. How much does the Illinois Public Action Group contribute to your Coalition?

Mr. ZEH. Our Coalition is basically not a funded type of activity. Most of us participate on a voluntary basis and cover our own costs. I believe there are some public relations costs that are covered by contributions from member FELA firms or participating FELA firms.

Senator PRESSLER. Do you receive funding from FELA lawyers?

Mr. ZEH. No.

Senator PRESSLER. Let me ask one more question. Maybe this has been asked. Can you give us, either now or in writing, the relationship between Citizen Action and the Illinois Public Action Council?

Mr. ZEH. No, I cannot, Senator.

Senator PRESSLER. I think that the Illinois Public Action Council is maybe one or two people which is being used as a conduit of money from law firms, to present themselves to the public as something called Citizen Action for Safety.

And if that is true, that is a very serious misrepresentation. Would you not agree? If that were true that would be a very serious misrepresentation, would it not, probably, if not a violation of the law?

Mr. ZEH. I would not want to comment on whether it would constitute a violation of the law.

Senator PRESSLER. But just from a moral point of view, would you say that that would be a misrepresentation?

Mr. ZEH. If they are affiliated, which again I cannot speak to, if they have a legitimate affiliation, then it may not be. I really do not know.

Senator PRESSLER. But if that were true, would you say that that is a very serious misrepresentation?

Mr. ZEH. I would say perhaps they might be able to engage in a much more forthright disclosure of their affiliations and associations.

Senator KASTEN. Let me just make a comment. This whole question here may or may not be related to a question having to do with campaign activities on the part of some of these groups.

That is not what we are talking about here, but evidently some of these groups with some of these names—I should not say evidently—certainly some of these groups with some of these names were involved in campaign activities. Most of them were 501 (c)(3) and (c)(4) organizations, and some of these groups have been involved in campaign activities.

And there recently was an FEC complaint which was filed by the Republican Senate Campaign Committee with relation to them.

But the key here is that this John Cameron of Citizen Action said that the FELA attorneys paid for the study. And what we are trying to figure out is if they are paying the Wisconsin Action Coa-

lition or if they are paying your group or if they are paying the Illinois Public Action Council.

Why did Robert Creamer become the expert on—no, let me try it the other way. Do you do anything except for lobby and work against FELA reform in your Coalition?

Mr. ZEH. Yes. We are in the process of formulating a safety data base for railroad safety matters.

Senator KASTEN. Will the FELA attorneys pay for that also or will there be other groups who will pay for that?

Mr. ZEH. I would imagine that there are a number of us—at least I am prepared to make some contributions on the part of our organization towards that endeavor.

Senator KASTEN. Is Mr. Robert Creamer, is he a particular expert in FELA? How did he get involved?

Why is it that the Illinois Public Action Council and not some other—what is Mr. Creamer's relationship to this issue?

Mr. ZEH. Again, there is some confusion. Let me go back to the report. The report was prepared by Mr. Creamer's organization, the Illinois Public Action Council, at the request of a group of FELA attorneys, and it was funded by them.

That was prior to my involvement, so precisely how that came about and why it came about I do not know. I do know from talking with Mr. Creamer that he has engaged in research projects in the past. So I assume he has some knowledge in the area and consequently was retained to do that.

Senator KASTEN. He is listed as the executive director of the Illinois Public Action Council. That is what his name is on the letterhead. But he also is part of your Coalition.

But let me, if I can, just switch to the basic point that Mr. Claytor was trying to work towards, and that is how can you achieve safety in the adversarial kind of atmosphere which is clearly there in the railroad industry?

We understand it is a declining labor force and there are other kinds of questions and problems. Are you familiar with this book called "Justice for the Injured Railroad Worker and How to Achieve It?

Mr. ZEH. I have seen it, Senator, but I have not read it.

Senator KASTEN. Well, I do not know who John H. Blount and Edward Devorak III are. It is published by the Justice Publishing Company.

But let me just go through this and point out a couple of things—the point I want to make is that this is a handbook for injured railroad employees. It clearly is written by a couple of trial lawyers. I guess they may be FELA lawyers, I do not know.

Do you know these people? Mr. Hardin, do you know these people?

Mr. HARDIN. I know both of them. Neither one of them are an attorney. They are just writers.

Mr. ZEH. Senator, I believe they are a couple of investigators that were looking to capitalize financially on their experience as FELA investigators.

Mr. HARDIN. Both of them at one time were members of my union. I do not think either one of them are in the railroad indus-

try, but they have never been connected with a UTU-designated counsel, I will say that.

Senator KASTEN. Well, what I am trying to establish here is this atmosphere in which all of these cases are being settled. And here are some of the instructions that employees receive:

> Pay particular attention to the questions that appear harmless. In reality, those questions are loaded. How badly are you injured? Always answer: It is not known at this time.
>
> What parts of your body are injured? The full extent of my injuries are unknown at this time.
>
> Describe how the accident occurred. If you answer this question inaccurately, the carrier can reduce the value of a possible claim. It is a very tricky question. Remember, you are not a doctor, so you do not know how badly you are injured.
>
> Say as little as possible. You can turn the table on the carrier to your own benefit. Your position is best defended by not admitting any wrongdoing.
>
> It is a good idea to bring a tape recorder to the investigation, if it is allowed, just in case the company wants to delete something from the transcript that is important.

This kind of an atmosphere—and one out of every how many workers is going to file a claim this year of all the people in the railroad industry? Is it roughly going to be one out of six, one out of seven?

Mr. ZEH. One out of ten.

Senator KASTEN. One out of ten workers.

Now, this kind of an atmosphere being established, how can Graham Claytor or anybody else make the press towards safety that they are trying to in terms of cooperation, if this is the kind of approach that people are taking?

Mr. ZEH. Senator, what you just read presupposes that someone has retained an FELA attorney and has one of those investigators handling his case. Eighty-five percent of the cases are settled without the aid or involvement of an FELA attorney.

So I think the carriers have overplayed the adversarial relationship with respect to the whole system, because, quite honestly, it works. We do not find the adversarial relationship that the carriers have alluded to.

It is like labor relations. Depending on where you are at, if you are talking about a carrier like Guilford Industries, there are no labor relations. It is a very hostile and adversarial relationship. The stuff you do not read about every day on other carriers goes along and it is not adversarial.

So I think this is the tip of the iceberg when it comes to the fact that the adversarial relationship is not as extensive as has been alluded to.

Senator KASTEN. Just one final area that I want to touch on. It is the same question that I asked the GAO people. Could you describe the relationship between the injured worker, the law firm, and the so-called investigators?

It has been alleged by some that what happens is that the union leadership elections are influenced in certain cases. That different law firms will back different people for local brotherhood elections, and then when their people win then the law firm gets those cases. There is a whole effort.

Now, I know that your 40th grand lodge passed a resolution opposed to or outlawing fee-splitting. Now, there must have been a problem beforehand.

But this whole relationship, could you describe what is going on with the law firms, the investigators, and the union elections?

Mr. ZEH. First of all, it is something that we hear about from time to time, that we all police very rigorously. And as you correctly indicated, we passed a resolution at our last convention, and published in our last Journal. We not only published a copy of that resolution, but a summary of a recent Sixth Circuit decision involving a workers comp situation where a union officer was indicted and convicted of involving himself with kickbacks comp attorneys.

It is like anything else; it probably does happen. It happens with workers comp, it happens with FELA. We have to police it.

All you have to do is pick up the Washington Post. It happens here in Washington, too.

Senator KASTEN. One final question, Mr. Hardin. All other transportation systems are covered under workman's comp. This FELA system is unique because it began in 1908, before workman's comp.

Workman's comp, incidentally, started in Wisconsin. But why is it that you feel we cannot cover this industry exactly the way we do all other industries, especially with the knowledge that this industry is not more dangerous, according to the testimony and the facts that we have received from several witnesses today?

What is it that you think makes it unique and therefore able to even avoid a test to see if the other process would work?

Mr. HARDIN. Well, Senator, of course, 1908—in 1907, 12,000 railroad workers were killed in one year. It was very, very dangerous then, due to light rail and bad track way and link and pin couplings and many other things.

It is just as dangerous today with heavy equipment, high speeds, super-hazardous materials, and higher speed trains and everything. But in the railroad industry, we have figures from everything.

I saw one in here about the trucks killing 4500 people when only 1200 were killed by the railroads. But the railroads had 44,000 injuries.

32 percent—the railroad is 32 percent higher than any industry in the United States in serious injuries. There is no doubt about that. It is still a very dangerous vocation.

And I just cannot associate workman's comp, where you pay somebody for hurting themselves, and when a man is hurt and can prove that his employer did not provide a safe place to work for him. Certainly he is entitled to more if he did his part.

FELA has stood the test of time. FELA is tied into our historically proven judicial system. A man is entitled to a jury of his peers. We are entitled to pain and suffering.

We talk about $4 million for two hands cut off. Who would sell their two hands for $4 million? I would not sell one of mine for $5 million.

Why change FELA? It does not have to be adversarial. 85 percent of them are settled.

We are a different industry, absolutely. It is very, very dangerous today. And FELA has been fair and it is proven for 81 years. So why change it?

I think it is to the advantage of the railroads, because the employee has to work safely or he is not going to get any money.

Senator KASTEN. This concludes the hearing today. There are going to be questions which will be submitted for all the witnesses. We would hope you get back to us in an appropriate period of time with the answers to the questions.

We would like to thank all the witnesses. The hearing is adjourned.

[Whereupon, at 4:47 p.m., the subcommittee was adjourned.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

STATEMENT OF NJ TRANSIT

NJ Transit appreciates this opportunity to submit for the record our view of the Federal Employers Liability Act (FELA).

NJ Transit is an instrumentality of the State of New Jersey created by an act of the Legislature in 1979 to coordinate and provide public transportation services throughout the State. Our Bus Operations subsidiary provides service for approximately 137 million passengers annually, and its employees are subject to the state worker's compensation system. The Rail Operations subsidiary, created in 1983 when then federally-owned Conrail ceased passenger operations, carries about 44 million passengers annually.

NJ Transit is a public agency in the same sense that Amtrak is. We have a total operating budget of $545.7 million with which we provide both bus and rail service. In fiscal 1988, of this $545.7 million total, $315.4 million (58 percent) was generated through the farebox. Another 7 percent ($38.8 million) came from the federal government, and 35 percent ($191.5 million) from the State.

NJ Transit supports Amtrak's request that it be exempted, on a demonstration basis, from the Federal Employers Liability Act (FELA). We would also like to propose that the demonstration be extended to include NJ Transit.

APPLICATION OF PROPOSED FELA EXEMPTION TO NJ TRANSIT

We believe that the FELA system needs to be updated, and we realize that a complete overhaul would be unrealistic at this time. Amtrak has proposed a demonstration project to determine whether state worker's compensation programs would provide adequate or better benefits at a lower cost to railroads and their employees. We believe it would be appropriate to expand this demonstration to cover NJ Transit, since it is an instrumentality of a State as well as a commuter railroad.

One reason for extending the exemption to cover NJ Transit is that while Amtrak operates in many states and a FELA experiment involving Amtrak would demonstrate the effectiveness of a variety of state worker's compensation systems, NJ Transit employs workers primarily in one state. The knowledge gained through an NJ Transit exemption could then be applied to other commuter and short line railroads, which also employ a large concentration of workers in a single state. Since New Jersey's state worker's compensation system provides an approximately average level of benefits compared to other states, New Jersey would be an appropriate state in which to locate a demonstration. Further, it can be argued that the FELA is not applicable to a railroad which is directly operated by a State.

BACKGROUND ON THE FELA

FELA governs all on-the-job injuries for railroad workers. Rather than receiving standard compensation through no-fault insurance for job-related injuries, railroad workers must sue their employers and prove negligence in order to be compensated. In contrast, nearly all other areas of industry, including local transit and intercity bus operations, are covered by no-fault worker's compensation. Workers are compensated for job-related injuries regardless of fault, and their medical and rehabilitation expenses are paid. Benefits are usually paid through insurance, without time-consuming and costly litigation. The enclosed booklet produced by commuter railroads explains the history of the FELA system in more detail. We would like to insert the booklet into the hearing record along with this testimony.

PROBLEMS WITH THE FELA SYSTEM

There are four basic problems with the FELA system. First, there is no consistent, rational formula for injury awards. Awards for similar injuries vary enormously, depending on the degree of negligence, the sympathy of the jury for the plaintiff, and the Court in which the suit is brought, among other factors. In one case, an employ-

ee who lost both legs in a job-related accident received a $7 million verdict. Another employee who also lost both legs received nothing.

Second, FELA is an adversarial system which encourages ill-will between employer and employee. The statute has no provision for rehabilitation, and the system actually encourages an employee not to seek rehabilitation and return to work, as that may reduce the potential monetary award. Employers are hesitant to allow workers to return to work, for fear of reinjury and thus further liability. The FELA system operates by accusation of wrong-doing and counter-charges against employees.

Third, much of what is paid out under the current system does not go to the injured party. Attorneys on both sides each receive an average of 25 to 40 percent of the award. Obviously an employee is not fully compensated if such a large portion of his award must go to his attorney. FELA costs rose from $434 million in 1980 to $526 million in 1986, a total increase of over 50 percent. The adversarial nature of the system forces railroads to maintain large legal and investigative staffs, adding $75 to $85 million per year in administrative costs of the FELA system.

Finally, court-shopping has become an integral part of the FELA system. Personal injury attorneys may choose the venue in which to file their suits, favoring jurisdictions with histories of returning large verdicts in favor of plaintiffs. The small section of the bar that receives the benefits of this situation predictably favors retention of the current system.

APPLICABILITY OF THE FELA TO STATE INSTRUMENTALITIES

NJ Transit is uniquely qualified to be included in an experimental exemption because we are the only commuter railroad which is also an instrumentality of a State. When the FELA was written in 1908, all railroads were privately owned and there were virtually no state worker's compensation systems. There is some question as to whether the application of the FELA to today's State operated commuter railroads is Constitutional. A recent Supreme Court decision, *Welch v. Department of Highways and Public Transportation, et al.*, 483 *U.S.* ——, 97 *L.Ed.*2d 389 (1987), held that in creating the FELA, Congress did not intend to waive the State's Eleventh Amendment immunity from suit in federal court. NJ Transit has been successful in moving to dismiss FELA actions filed in the federal courts in New Jersey on these grounds. This issue is currently pending before the Third Circuit Court of Appeals.

We believe that New Jersey's immunity from suits under FELA can be carried one step further to apply in state courts. There is no language in the FELA expressly stating that Congress intended its application to state-operated railroads. Historically, no state or state agency can be sued without its consent. New Jersey has expressly consented to suit in the New Jersey Tort Claims Act and the New Jersey Worker's Compensation Statute, but has never waived its sovereign immunity from suit in FELA lawsuits. The *Welch* case further strengthens the argument that FELA was never intended to apply to state-operated railroads like NJ Transit.

NJ Transit intends to pursue this issue through the judicial process. By granting us an experimental exemption, Congress would relieve us from the costs for legal research, court proceedings, and staff time which would otherwise be spent seeking a court ruling on the issue. This cost savings, in addition to the $1–2 million saved through the use of the worker's compensation system, will enable us to provide service in a more efficient manner with the federal, state, and farebox revenue we have.

FINANCIAL BENEFITS OF EXEMPTING NJ TRANSIT

NJ Transit estimates that we would save at least $1–2 million annually (15–30 percent of current FELA costs) by switching to New Jersey's no fault worker compensation system. Such a change would benefit employees, who would be assured of compensation appropriate to the type of injury and rehabilitation period without costly litigation. Accident investigations would then concentrate on creating a safer work environment, rather than assigning fault. As mentioned earlier, NJ Transit is a publicly funded agency. Any savings we achieve through a FELA exemption would be a direct savings to the taxpayers of this nation as well as of the State of New Jersey.

CONCLUSION

We understand that it may be premature to initiate a complete overhaul of the FELA system. A demonstration project, consisting of Amtrak and NJ Transit, would be an excellent and thorough vehicle for determining the feasibility and effective-

ness of such an overhaul. As federally supported railroads, Amtrak and NJ Transit would be ideal candidates for the demonstration. Any reduction in costs would be a direct savings which could then be invested in essential capital or operating improvements which would otherwise go unfunded or require additional federal subsidy.

We strongly urge the Subcommittee to consider creating this demonstration project. Through the provision of an experimental FELA exemption, a long and costly court battle will be circumvented.

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June 21, 1988

The Honorable J. James Exon, Chairman
Commerce Subcommittee on Surface Transportation
U. S. Senate

Dear Mr. Chairman:

We greatly appreciate your willingness to hold tomorrow's hearing on the Federal Employers' Liability Act (FELA).

Citizen Action and the Illinois Public Action Council (IPAC) are campaigning to preserve FELA. NARP is upset with the extent to which these groups have, in their campaign, misrepresented comparative passenger-safety records of Amtrak and the airlines.

The following excerpt from a Jan. 27 Philadelphia Inquirer story typifies the misleading impression these groups have conveyed: "The nation's railroads are 'much more deadly' than its airlines, said [Citizen Action Spokesman Robert] Creamer, citing a recent Citizen Action study....The study said 819 people were killed in railroad-related accidents in the first 9 months of last year, compared with 358 for the airline industry during the entire year. 'Many people ride trains because they believe they are safer than planes,' said Creamer. 'It just isn't so....'"

Enclosed is a copy of my response. A reasonable comparison of past rail/air passenger safety must:

o cover a multi-year period--preferably a decade--since the good passenger-safety records of both modes mean one or two accidents can skew the statistics for any given year; and

o count Amtrak and airline passenger statistics only. Freight-train-only accidents and non-passenger grade-crossing fatalities are not relevant. The latter frequently involve careless motorists--sometimes driving into the side of trains.

A late-1987 IPAC report, "Railroading the Public Safety: The Public Policy Implications of the Assault upon the FELA," used 1982-84--bad years for Amtrak (see enclosed list of Amtrak's passenger fatalities)--and avoided 1979 and 1985, commercial aviation's bad years. Airlines handle

virtually no daily commuting, yet IPAC includes commuter-train fatalities in statistics IPAC says prove that planes are safer than trains. IPAC did use a full decade's statistics on total rail industry fatalities, thus masking recent positive trends.

IPAC seems to blame grade-crossing accidents on the railroads, yet a Sep. 24 Tampa Tribune editorial said 40% of grade crossing accidents happen where warning lights and safety gates are present and working and "an astonishing 27% are caused...by drivers who simply crash into the sides of the trains." Other actions are needed: local police must treat the "running" of grade crossing signals as severely as they treat running regular red lights, and grade crossings should be closed wherever feasible.

As a non-lawyer who has observed the rail industry professionally for 16 years, I am stunned by IPAC's claim that "FELA is the most important single factor contributing to safety in American railroading." The report devotes 2 paragraphs to the 1982 Livingston, LA, wreck without noting the cause: operation of the engine by a non-qualified secretary because the engine crew was drunk and asleep. The impact of FELA on efforts to avoid that type of accident or human-error accidents in general is unclear.

Except for a passing reference to the "low levels of public funding" for Amtrak, the IPAC report ignores a complex web of public policies and controls which put railroads at a severe disadvantage. The report ignores the comparative safety record of railroads and trucks: trucks--which handle fewer tonmiles than railroads--are involved in accidents that kill 4,500 people per year vs. the railroads' 1,253 (IPAC's 10-year average that includes negligent motorists at grade crossings).

We recognize the need for continuing efforts to improve the safety of all modes, but we think the survival of the railroad industry is vital to maintaining and improving the overall safety record of U. S. transportation. We know of no convincing link between FELA and rail safety; we have heard no persuasive arguments supporting the application of FELA to railroads but not their competitors. In my phone conversation with Robert Creamer last year, I did not sense his awareness of the industry's financial problems--problems we think may someday force a choice between public track ownership and loss of the industry. Many of the points in this letter were included in my Nov. 13 followup letter to Creamer, which he never acknowledged.

Thank you for the 3-year Amtrak authorization and the awareness of Amtrak's importance which that legislation reflects!

Sincerely,

Ross Capon
Executive Director

cc: The Honorable Bob Kasten Jr.

Illinois Public Action Council

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'89 JUL 11 P1

June 29, 1989

Senator J. James Exon
United States Senate
Washington, DC 20510

Dear Senator Exon:

I have just received a transcript of a hearing conducted by your Subcommittee on Surface Transportation on June 22 of this year concerning the Federal Employers' Liability Act (FELA).

During the course of that hearing Senators Larry Pressler and Robert Kasten raised questions about Illinois Public Action Council and the national organization with which we are affiliated, Citizen Action. These questions went unanswered during the hearing. The questions had the effect of impugning the reputation and credibility of both organizations. In particular, the implication was made that the organizations represented little more than "fronts" for various groups of "trial lawyers". Nothing could be further from the truth. We are therefore extremely concerned that we have an opportunity to respond to these questions, and have prepared this letter to do so. We request that this letter be admitted into the hearing record.

THE ILLINOIS PUBLIC ACTION COUNCIL (IPAC)

I am the Executive Director of the Illinois Public Action Council which is the Illinois affiliate of Citizen Action, the nation's largest public interest organization. I am also the spokesman for Citizen Action on rail safety issues.

Illinois Public Action Council (IPAC) is the state's largest public interest organization. We represent 139,000 individual dues paying members as well as 130 affiliated organizations. Our individual members are recruited through our door to door and phone field operations. Our affiliates include many of the state's major labor unions (eg. United Auto Workers, International Association of Machinists, United Food and Commercial Workers, Amalgamated Clothing and Textile Workers); the Illinois State Council of Senior Citizen Organizations; many of the state's major farm organizations (eg. NFO, American Agriculture Movement); organizations of the disabled; many minority, community, consumer and women's organizations.

Our individual members come from throughout Illinois. According to a poll of our members which was recently completed by Targeting Systems Incorporated of Washington, our individual membership includes a wide cross section of income levels and socio-demographic groups.

Policy at IPAC is set by an 80-member Board of Directors that meets regularly. The Board is elected by an annual convention of four hundred delegates. The Board includes a former member of the U.S. delegation to the United Nations, three Congressmen (Lane Evans, Cardiss Collins and Charles Hayes), two State Senators, a State Representative, a college president, four International Vice-Presidents of major labor unions, the President of the Illinois State Council of Senior Citizens, representatives from dozens of consumer, farm, women's, and minority organizations, and numerous other prominent individuals from the business and legal community.

In addition, our organization has received support from a wide range of public officials in Illinois. Our 1987 annual dinner, which honored Sen. Dale Bumpers, was co-chaired by Sen. Paul Simon, Sen. Alan Dixon and the Mayor of Chicago.

The Illinois Public Action Council Board is currently chaired by Phil Immesote, International Vice-President of the United Food and Commercial Workers.

The Board of the Illinois Public Action Fund oversees fund raising and financial operations of the Council. It is chaired by Paul Stepan, a prominent developer and business leader in Chicago.

Last year, the Illinois Public Action Fund raised approximately $2.1 million dollars. Of that amount, some 90% was raised from our membership.

IPAC maintains offices in Chicago, Evanston, Rockford, Rock Island, Champaign and Edwardsville year round. It also maintains a full-time lobbyist in Springfield during the Illinois legislative session. The organization has a staff of 75 full-time personnel and another 25 who work on a part-time basis.

IPAC was organized over twelve years ago and has developed a formidable track record as a representative of consumer and public interest causes -- both at the state level and, through Citizen Action, in the Congress.

The organization has focused on a broad issue agenda which is selected by its Board. Over the years, our issue concerns have included utility rates, regulation of the insurance industry, toxic substances, financial institutions, the health care system, problems with education, civil rights, day care, the civil

justice system, prescription drugs, problems in the criminal justice system, product safety, military aide to Central America, and railroad safety.

IPAC works actively in conducting research, education and advocacy activities in these areas. In addition, the organization has occasionally conducted projects for other groups or governmental entities which share the organization's positions on various topics. Examples include projects for the Illinois Attorney General and the U.S. Law Enforcement Assistance Administration.

IPAC is widely known for the accuracy, integrity and the hard hitting content of its studies. As a consequence they are frequently published in the Illinois media.

The organization mantains two connected political committees. These committees -- one state and one federal -- make endorsements in a wide variety of political races. Endorsements are based upon the positions taken by the candidates with respect to the issue positions of the organization.

CITIZEN ACTION

In 1978, IPAC began work with four other similar state organizations to develop a national organization called Citizen Action. Today Citizen Action is the nation's largest public interest organization. It includes affiliates in 26 states representing a combined membership of 1.6 million. Taken together these organizations have a total of 75 offices, 1200 staff, and a combined budget of over $20 million. As with IPAC, the vast majority of all Citizen Action funds are raised directly from the membership.

Citizen Action is governed by a Board of Directors that includes representatives of each state affiliate, its national officers and a number of prominent at-large national members.

The organization has national offices in Washington, DC and Chicago. Over the past decade, it has been prominently involved in campaigns in Congress to halt gas price decontrol, create an expanded Superfund to clean up toxic waste, and promote expansion of national health care programs. It has been active in defending social security, promoting a national family leave and day care policy, and organizing opposition to Judge Bork's nomination to the Supreme Court and aid to the Contras.

The organization has become particularly well known for its national studies in areas like energy policy, health care and toxic substances -- studies that are widely published in media throughout the nation.

Citizen Action also maintains a connected political committee, though most of its endorsements are made at the state level by its state components.

CITIZEN ACTION AND RAIL SAFETY

As I have indicated, Citizen Action and IPAC have long been involved in activity concerning the transportation of toxic substances. Both organizations have also been involved for some years in the defense of the civil justice system, which we consider to be critical to assure responsible corporate conduct, employee and product safety. Note that we share this view with every other major consumer organization (Ralph Nader included.)

In 1986, IPAC had become increasingly concerned about rail accidents involving toxic materials, and lack of progress by state and local government in developing emergency preparedness plans.

Nationally, it came to our attention, that the Association of American Railroads was planning to begin a drive to eliminate the Federal Employers Liability Act (FELA). We were concerned that this change would materially damage the safety of American railroads and particularly the safety of trains transporting hazardous materials. In addition we believed that FELA was a more appropriate approach to workers compensation than most state laws, precisely because it places the burden of potential uncapped liability on employers for safety problems.

It is our organization's view that potential financial liability is the best economic incentive to safety in business. Rather than eliminate this law, we believe its principles should be expanded to other industries.

Late in 1986 we initiated discussions with a group of FELA trial attorneys who had a personal and professional stake in the continued existence of FELA. They were in the process of forming the Campaign for Safe Railroads and shared our goal of protecting FELA.

We conducted several meetings to begin to plan strategy for a campaign to defend FELA. The first decision made was the necessity of a study to explore the issue from our point of view. The lawyers group agreed to raise the funds to finance the costs of that study, some $50,000.

We subsequently combined our efforts with the rail labor unions and several other public interest organizations through the Coalition for Safe and Responsible Railroads.

Illinois Public Action Council was asked to provide the

staffing and speak for Citizen Action by the Citizen Action Board.

Last fall we published the product of our research entitled **Railroading the Public Interest**. This report was an indepth study of the FELA issue. Since that time we have been actively involved in disseminating the results of that study; and of subsequent studies we have developed on the rail safety issue.

During that period we have received financial support from the Campaign for Safe Railroads to help finance this activity.

In total funds received by IPAC to defray the cost of work on the FELA issue represent a tiny fraction of the IPAC budget -- just under 3% of total revenue. We have also raised considerable funds from our members to support this work.

IPAC has not received any funds from or through the Coalition for Safe and Responsible Railroads for any purpose.

Citizen Action itself has received no funds to defray the costs of rail safety activity.

The implication that IPAC or Citizen Action are simply "fronts" for trial lawyers shows a total lack of familiarity with the organizations, their history and operations.

We have often been accused of being obstinate, overly idealistic or unwilling to conpromise -- but we have never been accused of changing our positions to comport with the wishes of any financial interest -- lawyers or otherwise.

OTHER ISSUES

In the course of the hearing Senators Kasten and Pressler raised several other issues to which I would like to respond:

1) Does IPAC and Citizen Action cloak itself in different names in different cities when we talk about rail safety?

Of course not. These reports are released by Citizen Action on **all** occasions. We generally do them jointly with the Citizen Action Affiliate in the state. In Illinois that is Illinois Public Action Council. In Wisconsin it is the Wisconsin Action Coalition. Our local affiliates have different names because they were formed at different times by local organizations. In South Dakota there is no Citizen Action affiliate, so no other group was referred to.

All our press releases and other public material clearly indicate this as well describing the organizations involved.

2) What about an FEC fine paid by IPAC in 1986?

This fine has nothing whatsoever to do with our work on FELA. However, for the record the issue was quite simple. Our door to door canvass communicates our endorsements to members. It also spends some percentage of its time communicating endorsements to non-members. These non-member communications are financed by our PAC.

In the 1984 election we reimbursed IPAC from the PAC for this activity after the expense was incurred. The FEC felt that this constituted a corporate contribution, since funds were advanced by IPAC and then, only later, reimbursed by the PAC. They required that in the future we advance the funds to IPAC from the PAC before expenditures were made. They also levied a $5000 fine for the 1984 violation.

3) By communicating with the public through the media about positions of Senators on FELA, was Citizen Action being deceptive and unfair?

The positions we communicate with the public are the positions adopted by the Board of Citizen Action and the Illinois Public Action Council. Those positions are based upon our analysis of the issues and our best judgement concerning the public interest. Our organizations have long histories of battling for the public interest and are supported by millions of average people who support our positions.

We believe that our system of government is built upon the right of citizens to organize, to communicate with their fellow citizens directly and through the media; and to hold their public officials accountable

We are deeply disturbed that our right to engage in these activities has been questioned before your Subcommittee. We are hopeful that this letter may clear up any confusion on the part or any or the members.

Needless to say I would be happy to appear in person before your Subcommittee at any time.

Sincerely,

Robert Creamer
Executive Director

ALASKA RAILROAD CORPORATION

P.O. Box 7-2111 • Anchorage, Alaska 99510-7069

July 6, 1988

The Honorable J. James Exon, Chairman
Subcommittee on Surface Transportation
Committee On Commerce, Science and Transportation
United States Senate
SH-428 Hart Senate Office Building
Washington D.C. 20510

Re: AMTRAK Exemption from Federal Employers Liability Act

Dear Chairman Exon:

Thank you for this opportunity to present a written statement in support of legislation to transfer jurisdiction over AMTRAK employee claims for job related injuries to various state worker's compensation systems. The Alaska Railroad Corporation ("ARRC") is the only major freight and intercity passenger railroad in this country that is now subject to a state worker's compensation system. Accordingly, we appear to be in a unique position to describe for the Subcommittee just how well state worker's compensation provides for the needs of railroad employees and to address some of the arguments which have been raised against the proposed AMTRAK legislation.

You may know that the Alaska Railroad ("ARR") was built by the federal government beginning in 1914 to serve the transportation and development needs of the Territory of Alaska. It presently provides freight and passenger services which benefit residents and businesses in the State of Alaska. Under the able leadership of Senator Stevens of Alaska and other members of your Committee, the ARR was transferred to the State of Alaska effective January 5, 1985, pursuant to the terms of the Alaska Railroad Transfer Act ("ARTA"). Today, the ARRC operates as a quasi-private, quasi-public corporation maintaining 527 miles of track, employing over 700 full time and seasonal employees, and earning in excess of $50 million in annual revenues. ARRC has reported profitable operations in two of the last three years since transfer occurred.

While the ARR was federally owned, its employees were covered by the Federal Employees Compensation Act ("FECA"). This is a no-fault system available only to federal employees. Because the federal transfer legislation exempted the railroad from

FELA, ARRC employees today are covered by Alaska worker's compensation system. As an aside, it is worth noting that when ARTA passed, no serious consideration was given to the idea of subjecting the transferred railroad to FELA or any of the other labor statutes unique to the railroad industry. In fact, your Committee took the lead on this issue. The Committee's view was that since the railroad had never been subject to these statutes, there was no reason to start applying them in the future, especially when the state already had other appropriate laws in place, such as the one providing for worker's compensation. The fact that you chose not to apply these statutes to ARRC lends considerable credence to the notion that if Congress had it to do over again, it would not recreate these statutes. Instead, it would subject AMTRAK and other railroads to the same laws applied to the trucking industry and other businesses. We think it is not too late to grant AMTRAK, at least, a moratorium from worker's compensation.

The Alaska worker's compensation system is a no-fault program that protects workers from economic losses due to on-the-job injuries and occupational diseases. Coverage is provided for lost wages (past and future), medical expenses, rehabilitation costs, and death benefits to surviving dependents.

I understand that some representatives of railroad labor have argued that FELA provides the most equitable means of determining compensation for workers' injuries. However, FELA is a tort-based system, and employees must establish their right to compensation either through negotiation or judicial process. Worker's compensation, on the other hand, is a no-fault system which insures that workers receive speedy and comprehensive compensation and rehabilitation for work-related injuries. Our courts have construed the Act quite broadly and the program's liberality has been a benefit to employees with claims which would be marginal or nonexistent under a fault system such as FELA.

We strongly encourage our employees to report on-the-job injuries so that they can get immediate and fully paid medical and rehabilitation assistance. Immediate reporting also allows our company to quickly verify reports and institute remedial measures should safety hazards persist. Claims are seldom controverted and employees are usually entitled to economic and medical relief immediately. Since few cases are contested, lawyer's fees are minimal. The result is that employees receive higher benefits than they would under FELA where, I understand, lawyers collect between 25% and 33% of the payout.

Our employees also receive benefits that they would not receive under FELA. For example, employees receive benefits regardless of the fact that they may have contributed to their injuries due to their own negligence. In addition, should an employee suffer further problems after his or her case has been settled,

a worker's compensation case can be reopened and additional benefits paid.

Moreover, vocational rehabilitation is mandated in certain claims so that employees can qualify for other types of jobs in the event they are unable to return to their old railroad jobs. Other employees are encouraged to accept rehabilitation assistance when circumstance call for it. Successful rehabilitation is also in ARRC's interest since experienced employees are available to fill other roles and disability payments are eliminated or mitigated. The emphasis toward returning employees quickly to work or into rehabilitation contrasts sharply with FELA, where employees may wait for years for the results of the judicial process before seeking rehabilitation.

Some railroad labor representatives also argue that FELA promotes railroad safety by insuring that railroad management will be more accountable for railroad safety than under a no-fault worker's compensation system. However, based upon our experience under both federal and state no-fault worker's compensation systems, we believe that this is an unsupportable argument.

The ARR and ARRC have almost always been among the top third of railroads in their class in the annual FRA safety competition. Indeed, the ARRC won the Harriman silver award for 1985 and the ARR a bronze for 1984.

We are subject to a number of incentives for maintaining safe railroad employees, but FELA obviously is not among them.

First, we care about the personal welfare of our employees. No amount of money can replace a lost life or limb, or erase the grief we share with an employee and his family when injury strikes. We find that the best way to avoid the emotional and financial costs related to accidents is to help prevent them through a pro-active on-the-job safety program. As Mr. Claytor indicated in his testimony before the Subcommittee, FELA makes this sort of program difficult to implement.

The state worker's compensation system is, by the way, an expensive proposition from our perspective and also provides an economic stimulus for our safety programming. Since worker's compensation has been excluded from the ARRC's general liability policy, we are self-insured for worker's compensation and cannot rely upon insurance representatives to inspect our facilities and records and make recommendations as to how we can improve our safety record. We must promote safety on our own if we wish to keep the human and financial costs related to injuries down.

The cost of a major accident in terms of property damage, disruption of service, and third party liability far outweighs the cost of injuries to employees and is also a powerful incentive to maintain safe operations. As you know, transportation is a very competitive business and safe, reliable service is a factor that our customers take into account in deciding to use us or our trucking competitors. The FRA's Safety Enforcement Program has also been an effective incentive to employees and their supervisors to operate safely.

In conclusion, it is certainly up to Congress to decide whether to exempt AMTRAK from FELA even for a three-year test period. Perhaps our experience under a state worker's compensation system will be helpful to you as this decision process continues. In our view, worker's compensation affords an equitable and effective means for providing for railroad employees' work-related injuries. A state worker's compensation system can work as well for a railroad as for any other industry or company. FELA is not necessary to insure safe rail operations and we are certainly fortunate to be exempted from that archaic and ineffective legislation.

Thank you very much.

Sincerely,

W. G. Turgeon
President and Chief Executive Officer

cc: The Honorable Ted Stevens

6691L

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1988 JUL 11 PM 2:30

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July 6, 1988

Honorable J. James Exon
Chairman, Surface Transportation Subcommittee
Committee on Commerce, Science and Transportation
United States Senate
Washington, D.C. 20510

Dear Senator Exon:

On June 22, 1988 your subcommittee on Surface Transportation conducted a hearing on Amtrak and the Federal Employers' Liability Act (FELA). Mr. Geoffrey Zeh, International President of the Brotherhood of Maintenance of Way Employes, was a witness at that hearing.

Mr. Zeh subsequently contacted me and asked that we supply for the record certain information relating to questions posed to him by Senator Kasten and Senator Pressler relating to the Campaign For Safe Railroads and its law firm membership. He further requested that our relationship with the Illinois Public Action Council be explained. We are pleased to do so, and ask that this letter be included in the record.

The Campaign For Safe Railroads was formed approximately two years ago by a number of law firms whose practice, in part, involves personal injury litigation, including work in the field of FELA. Those attorneys noted on the Campaign's Executive Committee indicated above were the principal organizers of the group. There are now 40 law firms throughout the United States that are members of the Campaign.

The Campaign was formed with two primary purposes in mind. First, as a response to the dearth of public information on our perspective of FELA, we formed the Campaign to be in a position to help provide such information since an effort to repeal FELA was obviously being mounted by the railroad industry. Second, and quite apart from the question of FELA legislation, we formed the Campaign as an entity through which we could -- and now do -- organize educational symposia on current developments in the FELA field. This allows us to examine the case law for the benefit of all of the attorneys who practice in this field, as well as to have a mechanism for communication between ourselves.

In the process of organizing our efforts to develop public information on FELA, it was recommended that we talk with Illinois Public Action Council (IPAC). Several of our members had experience working with IPAC on tort-related legislative issues at the state level and as a result thought highly of IPAC's research capabilities on those subjects. IPAC was also well thought of by many on subjects relating to transportation, toxic and hazardous materials, and other relevant topics of concern to our clients and ourselves.

In our discussions with IPAC representatives, we were impressed with their apparent capabilities and found that IPAC's concerns and position with respect to the FELA were consistent with our own. We were pleased when they indicated to us that they were willing to conduct a study on the FELA. The Campaign consented to raise $50,000 from member firms to contribute to the cost of this study. We also agreed to provide our respective office efforts in gathering case-related information from member law firms, as well as other interested and experienced law firms throughout the United States.

It should be noted that the Campaign's relationship with IPAC was publicly reported in an article printed in the National Journal on 6/11/88 authored by Richard E. Cohen. In that article on page 1550 I am personally quoted as indicating that IPAC was paid $50,000 to prepare a document on railroad safety and that I found their work product to be excellent. I gave this interview to Mr. Cohen on May 19, 1988.

Further, in order to affect a meaningful dissemination of the information IPAC had developed in their study, the Campaign subsequently agreed to pay the necessary costs for the distribution of the report. It was contemplated that IPAC and its affiliated organizations would conduct press conferences in numerous states to accomplish the dissemination purpose. It was our presumption that in these press conferences IPAC would present a summary of the report's findings, and describe the relevance of the findings to circumstances in that state or region and its impact on rail safety and employee safety. Should IPAC address other topics in its press conference it would be clearly beyond the scope of our knowledge or control.

Both the Campaign For Safe Railroads and IPAC are members of the Coalition For Safe And Responsible Railroads, as are Citizens Action (IPAC's national affiliate), the Consumer Federation Of America, the Environmental Policy Institute, several railroad labor unions and the Railway Labor Executives' Association. Through this coalition, all of these organizations -- each of which supports FELA -- are able to exchange information and speak with a single voice on this important issue.

We trust this will clear the air of the misinformation and erroneous impressions that were projected at the hearing on June 22. In addition to submitting this letter for the hearing record, we are taking the liberty of sending copies to all members of the Transportation Subcommittee, as well as to Senator Metzenbaum, who participated in the hearing.

This letter is submitted on behalf of the Executive Committee of the Campaign For Safe Railroads and their respective law firms.

Respectfully submitted,

Robert J. F. Brobyn, Chairman
Campaign For Safe Railroads